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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

v.

BRAD L. SIMMONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment prohibits vesting in judges and juries the unlimited power to impose punitive fines without express statutory or common law limits or standards establishing in advance the range of punishments that may be inflicted for engaging in specifically defined conduct, and, if so, whether the $600,000 punitive damage award imposed against petitioner violates that Clause;

2. Whether it is a violation of the Due Process Clause of the Fourteenth Amendment to impose a $600,000 monetary punishment on petitioner predicated solely upon conduct of an independent contractor in which petitioner did not participate and which petitioner did not endorse, approve, or ratify; and

3. Whether defendants in civil actions in which punitive damages may be imposed are entitled under the Due Process Clause of the Fourteenth Amendment to some or all of the procedural rights accorded to defendants subject to punishment in criminal proceedings.

STATEMENT OF INTERESTED PARTIES

In addition to the parties named in the caption, Willie Foster and Land Associates, Inc., were parties in the consolidated proceedings in the court below. Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies and non-wholly owned subsidiaries of petitioner: General American Life Insurance Company has no parent company; it owns a majority interest in Sanus Health Plan, Inc.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

General American Life Insurance Company ("General American") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama. That court affirmed a $600,000 punitive damage judgment imposed against General American under principles of respondeat superior for the alleged fraud of an independent insurance agent in connection with the attempt of respondent's wife to purchase a $10,000 General American insurance policy. The court below expressly rejected General American's federal constitutional challenges to the punitive damage award.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Alabama affirming the judgment of the trial court is unreported

and reproduced in App. A, *infra*, 1a-27a. That court's April 12, 1990 order denying General American's Application for Rehearing is unreported and reproduced in App. B, *infra*, 28a-29a. The trial court's June 23, 1988 order denying General American's motion for a new trial is unreported and reproduced in App. C, *infra*, 30a-34a.

JURISDICTION

The December 22, 1989 decision of the Supreme Court of Alabama expressly rejected General American's federal constitutional (and state law) challenges to the $600,000 punitive damage award. That court denied rehearing on April 12, 1990. This petition is being filed within ninety days of the denial of the Application for Rehearing. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Statement Of Facts

On May 7, 1986, respondent met with Mr. Willie Foster, an independent insurance agent who operated Foster Insurance Agency, to inquire about burial insurance for his wife. Mr. Foster was licensed to sell life and health insurance for several companies, including General American. App. A, 10a. Mr. Foster

informed respondent that he was unable to provide a burial insurance policy, but suggested that respondent instead seek to purchase a $10,000 General American life insurance policy, the proceeds of which could be used for burial expenses. App. A, 2a.

Respondent returned his wife's completed life insurance application, along with a check for the annual premium, to Mr. Foster on May 30, 1986. App. A, 2a. Mr. Foster informed respondent that his wife would be required to undergo a medical examination in connection with her application for a life insurance policy. He provided respondent with a "conditional receipt" agreement which explained that interim insurance coverage pending General American's final approval of the policy was conditioned upon an ultimate determination that the "proposed insured was acceptable" under General American's "rules, limits and standards" (*i.e.*, a "standard risk") at the time of application. App. A, 11a.[1] However, respondent testified that Mr. Foster told him that the policy would be in force as soon as it was determined that the check for the annual premium was valid. App. A, 3a. Mr. Foster denied making this statement. *Id.*

A medical examination of respondent's wife was later performed and General American also requested copies of her medical records. App A, 3a. On July 4, 1986, prior to General American's approval of her life insurance application, respondent's wife died of a

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[1] The conditional receipt agreement also contained a disclaimer that stated that "[n]o agent or broker is authorized to waive or change any terms of receipt, or of the policy . . . applied for, or any other right of Company . . . . This receipt is not a binder. No agent, broker or medical examiner can accept risks[,] appraise insurability or bind us in any way." R. 260.

"massive heart attack." *Id.* This fact was communicated to General American on July 7, 1986. *Id.*

General American received the medical records on July 10, 1986. On July 15, 1986, after reviewing the records, General American concluded that respondent's wife had not been a "standard risk" at the time she submitted the application, due to "her history of peptic ulcer disease, drug abuse and dependency, and abnormal EKG indicative of ischemia or heart disease." App. A, 3a. On that basis, General American denied interim insurance coverage under the "conditional receipt" agreement.

On August 21, 1986, respondent brought this action against General American and Mr. Foster, seeking $10,000 in compensatory damages and $3,000,000 in punitive damages for alleged fraud, "bad faith," and breach of contract. General American denied respondent's allegations in its answer and asserted, *inter alia*, that the imposition of punitive damages in this case would violate the Fourteenth Amendment to the United States Constitution.

The trial court granted summary judgment in favor of General American on respondent's claim that General American had denied interim insurance coverage in "bad faith." The case went to trial on the fraud and breach of contract causes of action. The jury found in favor of General American on respondent's breach of contract claim, but returned a $2,500,000 punitive damage verdict jointly against Mr. Foster, General American and General American's general agent, based upon Mr. Foster's allegedly fraudulent representation regarding immediate commencement of coverage.

In its post-trial motions, General American reasserted its challenge to the imposition of punitive damages in this case under the Due Process Clause of the Fourteenth Amendment, arguing, *inter alia*, that the jury's "bias, passion and prejudice" as well as its "complete and unbridled discretion to apply its own subjective values in awarding punitive damages without regard to any frame of reference such as statutory maximum" resulted in an arbitrary and excessive punishment. App. D, 36a-37a. In addition, General American argued that punitive damage defendants are entitled to procedural protections similar to those accorded defendants in criminal proceedings. *See* App. D, 36a.

The trial court deemed the punitive damage award "simply too much for the conduct of which defendants were guilty," but denied General American's motion for a new trial, conditioned upon respondent's acceptance of a remittitur of $1,900,000 of the punitive damage award.[2] App. C, 32a-33a. Respondent filed an

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[2] The trial court rejected General American's argument that it was denied the right to an impartial jury because three jurors failed to respond to a voir dire question regarding whether any of the prospective jurors had ever been a plaintiff or a defendant in a lawsuit, when in fact all three of those jurors had been involved in litigation against insurance and financial services companies. *See* App. A, 15a-19a. General American asserted that the jurors' failure to respond denied it the right to use effectively its peremptory and for cause challenges in selecting the jury and resulted in "probable prejudice" to General American. The trial court refused General American's request that the three jurors be summoned to an evidentiary hearing. Despite its refusal to permit an examination of these jurors on this point, and thus without any testimony from the jurors, the trial court found " 'substantial temporal remoteness of the previous liti-

acceptance of the remittitur and all parties appealed to the Supreme Court of Alabama.

On appeal, General American renewed each of its federal constitutional objections to the remaining $600,000 punitive damage award, contending, *inter alia*, that "Alabama law is flawed . . . because the jury has unlimited discretion and no defined standard by which to assess punitive damages" in violation of the Due Process Clause. App. E, 40a. In addition, General American argued that the award violated due process because it was excessive and "grossly disproportionate," and objected to the imposition of such monetary punishment in the absence of " 'the types of safeguards present in criminal proceedings.' " App. E, 43a, *quoting Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting)).

The Supreme Court of Alabama affirmed the judgment against General American in an opinion issued on December 22, 1989. That court denied General American's Application for Rehearing on April 12, 1990. On June 4, 1990, Justice Kennedy granted General American's application for a stay of the judgment of the Supreme Court of Alabama. (A-845)

B. The Decision Below

In rejecting General American's challenges to the $600,000 punitive damage award under the Due Proc-

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gation to the case, inadvertence on the part of these venire persons, or a misunderstanding—at least on their part—of the questions as they related to them personally.' " App. C, 30a (citation omitted). The trial court also "immediately reject[ed] bias" of the jury as a potential contributing factor to the excessiveness of the award, as well as "passion or other improper motive." *Id.*, 32a.

ess Clause of the Fourteenth Amendment (as well as the Excessive Fines Clause of the Eighth Amendment), the Supreme Court of Alabama noted this Court's holding in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal Inc.*, 109 S. Ct. 2909 (1989), that the "excessive fines clause of the eighth amendment does not apply to punitive damages awards in cases between private parties,"[3] App. A, 19a-20a, but it failed to acknowledge that the Court in *Browning-Ferris* left open the question whether the Due Process Clause of the Fourteenth Amendment constrains the otherwise unlimited discretion of judges and juries to impose punitive damages. Instead, the court below disposed of General American's Due Process Clause challenges based upon a number of its own recent opinions, including *Pacific Mutual Life Insurance Co.* v. *Haslip*, 553 So. 2d 537 (1989), *cert. granted*, 110 S. Ct. 1780 (1990), in which that court "has consistently rejected the same arguments made by the defendants and has upheld the constitutionality of punitive damages." App. A, 20a.

In addition, the court below cited to "guidelines" it has adopted "to be used by the trial court in re-

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[3] At each stage of this litigation, petitioner also challenged the imposition of punitive damages under the Excessive Fines Clause of the Eighth Amendment. Given the apparent breadth of the holding of this Court in *Browning-Ferris* on the merits of the Excessive Fines Clause question, petitioner places primary reliance in this petition on the Due Process Clause. However, as pointed out in the text *infra*, at 16, at least one member of the court below has asserted, and none have apparently contradicted, the proposition that a punitive damage plaintiff in Alabama acts as an "agent of the state" in seeking punitive damages. Thus, the Excessive Fines Clause may be applicable to this case. *See also* note 9 and accompanying text, *infra*.

viewing punitive damage awards," App. A, 20a, to support its conclusion that the Alabama punitive damage system comports with federal due process requirements. The court below found that the trial court properly applied these "guidelines" in determining that the jury's $2,500,000 award was "simply too much" and in substituting its own, *ad hoc* judgment that a $600,000 punishment was appropriate.[4]

The court below also rejected General American's state law challenge to the imposition of punishment against it under the doctrine of respondeat superior. The court acknowledged that "Foster had no actual or apparent authority as an agent" of General American when he made the alleged fraudulent representation. App. A, 4a. However, the court below concluded that such a nexus is not required under Alabama law. It observed that the test in determining whether to impose vicarious liability for punitive damages " 'is whether the alleged principal reserved a right of control over the manner of the alleged agent's performance.' " App. A, 9a, *quoting Carlton* v. *Alabama Dairy Queen, Inc.*, 529 So. 2d 921, 923 (Ala. 1988).

To determine whether General American could be held vicariously responsible for Mr. Foster's conduct

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[4] These "guidelines," which the Supreme Court of Alabama first enunciated in *Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), merely require the trial court to consider such general factors as "the gravity of the wrong and the nature and extent of the injury inflicted upon plaintiff" and to compare the punitive damage award with other punitive awards in "similar cases." *See* App. A, 21a. In light of these factors, the trial court must determine whether the punitive damage award is so excessive as to " 'shock the judicial conscience of the court.' " *Id.*, 23a (citation omitted).

in this case, the court below began with an examination of the contract between General American and Mr. Foster. That contract expressly provided that it did not "create the relationship of employer and employee" or "interfere with the freedom of the Agent's action as to the manner, time or place in which he conducts his business." It also stated that the "Agent shall have no power with respect to any contract to which the Company is, or purports to be a party, to make, alter or discharge such contract, or to waive any forfeiture or the performance of any of the terms or conditions of such contract." App. A, 6a. Despite this contractual language, and even though Mr. Foster's alleged statement regarding the commencement of coverage squarely contradicted the "conditional receipt" agreement's express terms,[5] the court held that General American could be punished under the doctrine of respondeat superior. The court noted that the requisite "agency" relationship "is not determined by how the parties characterize the relationship, but by the facts of each case," and that General American "had the authority to hire and fire its agents, to determine the methods by which they were trained, to issue its company training manuals, and to pay its agents their commissions." App. A, 10a. Thus, vicarious punishment could be imposed "in spite of the fact that [General American] did not participate in the fraud or even forbade it." *Id.*, at 8a, *quoting*

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[5] *See* note 1 and accompanying text, *supra*. The record contains no evidence that respondent's wife, or even respondent, detrimentally relied upon Mr. Foster's alleged misrepresentation, or that respondent's wife would have been able to obtain a life insurance policy from any other company given her medical history.

Washington National Insurance Co. v. *Strickland*, 491 So.2d 872, 875 (Ala. 1985).

Based upon the foregoing, the Supreme Court of Alabama affirmed the vicarious imposition of a $600,000 monetary punishment against General American in this case. Justice Houston concurred, but observed that "[p]unitive damages . . . are out of hand," and expressed the view that the Alabama system is, at least as a matter of state law, "procedurally defective, perhaps to the extent of being unconstitutional as a matter of procedural due process." App. A, 25a-26a. Noting that the trial court had reduced the jury's award "in accordance with the only standards that [the Supreme Court of Alabama] has provided," and, "being pragmatic," Justice Houston concurred in the judgment. *Id.*, 26a.

REASONS FOR GRANTING THE WRIT

In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), the Court announced that the question whether the "lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment" raises an "important issue[ ] which, in an appropriate setting, must be resolved . . . . " This case presents the Court with the opportunity to decide that issue. The Alabama punitive damage system, like the systems of most jurisdictions, is a lottery that exposes civil litigants to unlimited, state-imposed, jury-assessed monetary punishments in the form of punitive damages for deviation from vague, ill-defined "standards" of conduct. The questions presented in this petition are presently before the Court in another Alabama case, *Pacific Mutual Life Insurance Co.* v. *Haslip*,

553 So. 2d 537, *cert. granted*, 110 S. Ct. 1780 (1990), which the court below viewed as dispositive of General American's federal constitutional claims.[6] General American's Due Process Clause challenges to the Alabama punitive damage system are indisputably substantial and worthy of review in this case.

A. The Questions Whether And In What Manner The Due Process Clause Limits The Imposition Of Punitive Damages Should Be Decided By the Court In This Case

General American has been severely punished in this case for conduct in which it did not participate and that it did not authorize, approve, or ratify. As the court below noted, the jury's decision to impose liability against General American was made in the absence of any standards defining the conduct or relationship that would subject General American to vicarious punishment for the acts of Mr. Foster. Indeed, the jury was permitted to inflict punishment based

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[6] *See also The Ohio Casualty Insurance Co.* v. *G. Amador Corp.*, *stay granted*, April 17, 1990 (A-713) (O'Connor, Circuit Justice), *pet. for cert. filed*, June 19, 1990 (No. 89-1986) ($10,000,000 punitive damage award); *Eichenseer* v. *Reserve Life Insurance Co.*, 881 F.2d 1355 (5th Cir. 1989) ($500,000 punitive damage award), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (No. 89-1303); *George* v. *International Society for Krishna Consciousness of California*, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989) (subsequently ordered to be depublished) ($2,500,000 punitive damage award), *stay granted*, 110 S. Ct. 1804 (1990), *cert. pending* (No. 89-1399); *Wollersheim* v. *Church of Scientology*, 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989) ($2,000,000 punitive damage award), *cert. pending* (No. 89-1361); *Hospital Authority of Gwinnett County* v. *Jones*, 386 S.E.2d 120 (Ga. 1989) ($1,300,000 punitive damage award), *cert. pending* (No. 89-1315).

upon its subjective view of the "facts of [this] case," nothwithstanding the express contractual definition of the parties' relationship and General American's lack of participation in or connection to the alleged fraudulent conduct at issue.[7] Upon finding liability, the jury was afforded unfettered discretion to punish in virtually any amount; it imposed a $2,500,000 punitive damage judgment jointly against all three defendants without regard to their relative culpability.

The trial court, applying such vague and amorphous factors as the "gravity of the wrong" and "the nature and extent of the injury," App. A, 21a, determined that the punishment imposed by the jury was "simply too much." That court did not, however, offer any explanation for how the punishment it chose to inflict fulfilled in a rational fashion the State's avowed objectives of retribution and deterrence. As respondent himself argued to the court below, the trial court's own choice of a $600,000 punitive award "amounted to nothing more than substituting the subjective judg-

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[7] As petitioner in *Pacific Mutual* argues, the imposition of liability based upon a theory of respondeat superior itself violates the Due Process Clause where, as here, there is no connection between the conduct of the alleged wrongdoer and the purported principal. *See* Br. of Pet., at 27-32, in *Pacific Mutual*; Br. of National Ass'n of Mutual Insurance Companies as Amicus Curiae in Support of Petitioner, at 3-12, in *Pacific Mutual*. Although petitioner did not expressly invoke the Due Process Clause in support of its argument in the courts below that it could not be punished under a respondeat superior theory, this constitutional error may be noticed by this Court in light of the grant of certiorari in *Pacific Mutual* and the fact that, given the resolution of this question by the Supreme Court of Alabama in *Pacific Mutual*, petitioner's additional reliance on the Due Process Clause would have been a futile act.

ment of the court for that of the jury." App. for Reh., at 7. Although the trial court imposed a $600,000 penalty, "[i]t could, as well, have been almost any other amount." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting).

The court below recently has stated that it "can envision no set of standards that would guide every jury" in punitive damage cases because "the *degree* of punishment necessary . . . changes with each case" and in some cases "juries should be entitled to punish defendants so severely as to destroy them; justice demands that." *Central Alabama Electric Cooperative* v. *Tapley*, 546 So. 2d 371, 377 (Ala. 1989) (emphasis in original); *see also Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381, -385, slip op., at 5 (Ala. June 23, 1989) (on rehearing) ("If the existence of malice, wantonness, or negligence is supported as fact by evidence in the record, 'we must see no offense to the Constitution, and no deprivation of any constitutional right of [the defendant] in committing the assessment of such damages, *including the amount to be allowed*, to the sound discretion of the jury.' ") (*quoting Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 719, 60 Cal. Rptr 398 (1967)) (emphasis added). It has also expressed substantial doubt that any specific limit could be placed on the amount of punitive damages the jury might award without violating the right to a jury trial guaranteed by Alabama's constitution.[8] *Industrial Chemical*, slip op., at 5 & n.2.

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[8] In 1987, the Alabama legislature enacted a $250,000 ceiling on punitive damages that does not apply to a wide array of

The petition should be granted so that this Court can finally resolve the question whether such a system, in which potential punitive damage defendants are given virtually no notice of the levels of punishment to which they may be subjected for ill-defined or undefined conduct, comports with the Due Process Clause. Indeed, this Court should consider why due process is not violated by the imposition of any punitive damages in the absence of an established "range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris*, 109 S. Ct., at 2923 (Brennan, J., concurring). Moreover, as Justice Brennan has noted, "even where a statute sets a range of possible civil damages . . . the Due Process Clause forbids damages awards that are 'grossly excessive.' " *Id.*, *quoting Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). Under that standard, the award at issue, which vastly exceeds legislatively established punishments for the same or similar conduct, *see, e.g.*, *Ala. Code* §§ 13A-4-3, 13A-

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cases—wrongful death cases, cases involving a pattern or practice of intentional conduct, cases involving "actual malice," cases involving defamation, libel or slander, and cases like this one in which the cause of action "accrued prior to June 11, 1987." *See* Ala. Code § 6-11-21, § 6-11-24, § 6-11-29 (Supp. 1988). In such cases, Alabama juries retain discretion to award punitive damages in any amount.

Moreover, on January 4, 1990 the United States District Court for the Middle District of Alabama certified to the Supreme Court of Alabama the question whether the $250,000 statutory limit on punitive damages violates the Alabama constitution's guarantee of a right to a jury trial. *Trawick* v. *Michaels of Oregon Co.*, No. 89-419 (Ala.). Thus, it is especially important for this Court to announce in this case the limits placed by the federal constitution on the punitive damage system in Alabama.

5-12, 13A-9-41, *et seq.* (1975) ($1,000 maximum criminal fine for "business fraud"), is "grossly excessive."

The imposition of a criminal fine against General American in the absence of any statutory limits would surely be forbidden by the Due Process Clause. *See United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). In administering punishment in criminal cases, there is simply no credible argument against the principle that the law must "fairly and clearly define . . . the punishment which can be administered." *Berra* v. *United States*, 351 U.S. 131, 139 (1956) (Black, J., dissenting).

Likewise it would appear that these same due process principles would prohibit the infliction of a limitless civil fine payable to the State.[9] Indeed, it seems inconceivable that this Court would uphold a statute enforced by a State that expressly left with a jury or a judge the right to impose a fine, based upon "the facts of each case," solely in their discretion. *See Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). As this Court stated in *United States* v. *Halper*, 109 S. Ct. 1892 (1989), in applying the Double Jeopardy Clause to the punitive component of an ostensibly "civil" fine, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 1901-02. *See Browning-Ferris*, 109 S. Ct., at

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[9] The excessiveness of any such fine seemingly would be subject to scrutiny under the Eighth Amendment. *See Browning-Ferris*, 109 S. Ct., at 2914, 2916, 2918 & 2920.

2920 n.21. Under *Halper*, punishment is constitutionally distinct from damages constituting compensation and necessarily implicates due process concerns quite discrete from those invoked by purely compensatory damages.

In fact, punitive "damages" is a misnomer. Such awards are state-imposed punishments that serve no compensatory function but, rather, seek to fulfill the State's retributive and deterrent objectives. Punitive damages are therefore generically in the class of criminal punishments and civil fines and not akin at all to "damages." "Since punitive damages are not to compensate a victim for loss but to punish and deter, *the state alone* is considered the true party plaintiff, and *in seeking punitive damages, a plaintiff is an agent of the state* and not a victim." *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1048 (Ala. 1988) (Houston, J., dissenting) (emphasis added). Thus, the same due process standards that apply to criminal and civil fines should apply equally to punitive fines whether labeled as such or not.

In addition to depriving General American and other defendants in punitive damage cases of their procedural due process right to fair notice of the punishment that may be administered for specifically defined and clearly prohibited conduct, the absence of legislatively established limits or standards puts the quintessentially legislative task of determining the amount of punishment necessary to fulfill society's goals of retribution and deterrence[10] into the hands of civil

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[10] *See Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy").

juries. Those juries, which come together for a single case, enact and impose a maximum punishment on an *ad hoc* and purely subjective basis in the only case they will ever consider. The court below has made quite clear that under Alabama's punitive damage system, this consummately legislative task is for the jury to perform individually, *de novo*, based upon the jury's retroactive evaluation of the peculiar facts of a single case. In the view of the Supreme Court of Alabama, due process has nothing to do with the random assessment of enormous and capricious punishments by juries:

> The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit.

Central Alabama, 546 So. 2d, at 377.

Thus, the court below exalts one of the very characteristics of the punitive damage system that renders it incompatible with the Due Process Clause of the Fourteenth Amendment. This Nation chose to implement a system of laws, particularly as regards the infliction of punishment, that minimizes the chances that punishment will be inflicted arbitrarily, capriciously, randomly, unpredictably, unequally or excessively. That the punitive damage system crosses all of these constitutional boundaries drawn by the Due Process Clause is obvious; there is virtually no dissent from the proposition that punitive damage awards, as

the award in the case at bar, are "frequently based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).[11]

As this case and the many punitive damages cases that have come to this Court in recent years amply demonstrate, post-judgment review of punitive damage awards is manifestly inadequate to protect against the infliction of arbitrary and excessive monetary punishments in the absence of a statutory range of penalties. Moreover, judicial review to determine whether a particular punitive damage verdict is excessive or disproportionate after the fact is not likely to cure the threshold flaw of the punitive damage system—the lack of *advance* notice of the amount of punishment that can be inflicted.

As stated by Justice O'Connor, the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part). Due process demands that judges and juries be confined in their ability to administer punishment by the deliberative judgments of legislatures regarding: (1) the amount of punishment necessary to secure society's interests in punishing and deterring specifically defined conduct; and (2) the standards under which the judge and jury are to arrive at an appropriate punishment in a particular case. This question is important, implicates a broad spectrum of civil litigation in which punitive damages are available, and should be decided in this case.

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[11] *See* note 2, *supra*.

B. The Question Whether Punitive Damages May Be Imposed Absent Federal Constitutional Protections Accorded To Defendants In Criminal Proceedings Should Be Decided By The Court

In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), this Court invalidated a federal statute that automatically sanctioned persons with loss of citizenship but did not afford "due process of law" or the procedural guarantees accorded to defendants in criminal cases under the Fifth and Sixth Amendments. *Id.*, at 165-66. Although the statute was not labeled criminal, the Court concluded that the "provisions in question can only be interpreted as punitive," *id.*, at 169, and "as such cannot constitutionally stand, lacking as they do the procedural safeguards which the Constitution commands." *Id.*, at 186.

The $600,000 sanction imposed against General American in this case similarly "can only be interpreted as punitive."[12] The State of Alabama has conferred on plaintiffs the power to prosecute defendants for antisocial conduct generally as "agent[s] of the state"[13] and to exact monetary punishments which are constitutionally indistinguishable from, and generally vastly greater than, the punitive fines imposed upon conviction after proof beyond a reasonable doubt for more egregious, clearly defined and prohibited antisocial conduct after a criminal trial. The States should

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[12] This Court's "cases abound with the recognition of the penal nature of punitive damages." *Browning-Ferris*, 109 S. Ct., at 2923 (O'Connor, J., concurring and dissenting). *See, e.g.*, *City of Newport* v. *Fact Concerts, Inc.*, 458 U.S. 247, 266-67 (1981); *Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

[13] *Tatum*, 523 So. 2d, at 1048 (Houston, J., dissenting).

not be permitted to evade federal constitutional strictures simply by turning over the fruits of a punishment scheme to a private party. *See Missouri Pacific R. Co.* v. *Humes*, 115 U.S. 512, 522-23 (1885). Indeed, the infliction of severe penalties at the behest of interested private litigants only aggravates the system's fundamental due process defects. *Cf. Young* v. *United States ex. rel. Vuitton et Fils*, 481 U.S. 787, 815 (1987) (Blackmun, J., concurring) (expressing the view that prosecution of criminal contempt actions by interested private litigants violates due process).

The civil imposition of highly oppressive punitive damage awards cannot be reconciled with the Court's cases, which require that before the States may impose sanctions in order to punish and deter antisocial conduct, "due process of law" and the guarantees of the Fifth and Sixth Amendments must be accorded to defendants. Question 2—whether "a punitive 'fine' should be imposed after a civil trial," *Smith* v. *Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting)—is manifestly of great importance and worthy of plenary consideration by the Court in the case at bar.

CONCLUSION

The Supreme Court of Alabama has repeatedly and unequivocally rejected petitioner's arguments that the United States Constitution limits the imposition of punitive damages for ill-defined conduct, controls the size of punitive damage awards, and regulates the manner in which they may be imposed. The Court's resolution of the questions presented by petitioner will have a substantial impact on matters that are arising daily in the courts of this Nation and are dramatically changing the character of litigation conducted

throughout the United States. Petitioner respectfully prays that this petition be granted and that these questions be set for plenary consideration.

July 10, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1989-90

87-1313

Land & Associates, Inc.
v.
Brad L. Simmons

87-1320

Willie Foster
v.
Brad L. Simmons

87-1331

General American Life Insurance Company
v.
Brad L. Simmons

87-1339

Brad L. Simmons
v.
General American Life Insurance Company, *et al.*

Appeals from Mobile Circuit Court

(CV-86-002340)

ADAMS, JUSTICE.

This action comes before this Court on consolidated appeals involving alleged fraud in the sale of a life insurance policy insuring the life of Jane Simmons, plaintiff's deceased wife. The jury returned a verdict against the defendants, General American Life Insurance Company ("General American"), Land & Associates, Inc., and Willie Foster, in the amount of $2.5 million dollars, which was remitted by the trial judge to $600,000. We affirm in part, reverse in part, and remand.

On May 7, 1986, Willie Foster, while visiting his brother at work, met with the plaintiff, Brad Simmons, to discuss burial insurance for his wife. Foster operated Foster Insurance Agency and was licensed to sell life and health insurance policies for several companies. Foster told Simmons that he could not provide a policy for burial insurance, but that he could offer a $10,000 policy with General American, and that the proceeds could provide funds for burial expenses.

Foster told Simmons what the amount of the annual premium would be and gave him an application for his wife to complete and sign. Simmons left the application in his briefcase and did not return it to Foster until May 30, 1986.

At the time Simmons returned the application, he gave Foster an annual premium. Foster looked at the application for completeness, but did not give it much attention in detail. Simmons also received a "Conditional Receipt and Interim Insurance Application," which specified the conditions under which interim insurance was afforded. Simmons admitted that he did not read that application.

Foster also told Simmons that his wife would be required to undergo a medical examination. Simmons con-

tends that after paying the premium he asked Foster at what point his wife would be insured. Foster allegedly replied, "Just as soon as I get that check, if it's any good."

After receiving the material from Simmons, Foster delivered the application and annual premium to Land & Associates. Land & Associates served as a geographical brokerage agency for General American. Land & Associates, in turn, forwarded the application and annual premium to General American's home office.

A medical examination was later performed in the Simmons home by a nurse, who met with Jane Simmons. General American then wrote to Jane Simmons's primary physician and requested her medical records. These records were not received until July 10, 1986.

On July 4, 1986, Jane Simmons died of a massive heart attack. Brad Simmons notified Foster of his wife's death, and Foster in turn notified Land & Associates. Land & Associates apprised General American of Mrs. Simmons's death on July 7.

On July 10, 1986, General American received the medical records from Mrs. Simmons's primary physician. On July 15, 1986, the underwriting department of General American made its formal decision that Jane Simmons had not been a "standard risk" when she applied for insurance coverage.

Although General American claimed that Jane Simmons had made numerous misrepresentations on her application, it did not deny coverage for that reason. General American claimed that the determination that Jane Simmons was not a "standard risk" was made due to her history of peptic ulcer disease, drug abuse and dependency, and abnormal EKG's indicative of ischemia or heart disease.

On August 21, 1986, Simmons sued General American and Willie Foster, alleging breach of contract, bad faith, and fraud. Simmons later amended his complaint to add

Land & Associates as a defendant. The trial court entered summary judgment in favor of the defendants as to Simmons's claim for bad faith, and the case proceeded to trial on the remaining claims for breach of contract and fraud.

The jury returned a verdict against all the defendants and assessed damages in the amount of $2.5 million. The defendants timely filed motions for a new trial, judgment notwithstanding the verdict, and remittitur. One of the grounds for defendants' motion for new trial was that during voir dire three jurors had failed to disclose that they had been parties to previous litigation.

After submission of briefs and argument, the trial court denied the motions for new trial, conditioned upon Simmons's acceptance of a remittitur of damages in the amount of $1.9 million. Simmons filed an acceptance of the trial court's remittitur within the time prescribed by the court's order. General American, Land & Associates, and Foster appealed; Simmons cross-appealed as to the trial court's remittitur of damages.

The parties raise several issues for our review on appeal. We have consolidated several of the issues for clarity.

I.

Simmons has conceded that Foster had no actual or apparent authority as an agent, but argues that General American and Land & Associates are liable under the doctrine of respondeat superior. Therefore, the threshold question to be determined at this point is whether Foster made the allegedly fraudulent statement—that coverage would be effective as soon as he received a check for the premium—while acting within the line and scope of his employment. This theory of liability depends not only upon the status of Foster, but also upon the status of Land & Associates.

In *National States Insurance Co. v. Jones*, 393 So. 2d 1361 (Ala. 1980), we stated:

> " 'As we see it, the extent of the authority of . . . [the] agent to bind [the corporate] appellant in contract is not necessarily conclusive in proof of liability of appellant in tort. The liability of a corporation for the torts of its employees, whether agent or servant, is grounded upon the principle of "respondeat superior" not the principles of agency. 3 Am.Jur.2d, Agency, § 267. The factual question to be determined is whether or not the act complained of was done, either by agent or servant, while acting within the line and scope of his employment. The corporation or principal may be liable in tort for the acts of its servants or agents, done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them.' "

393 So. 2d at 1367 (citations omitted) (quoting *Old Southern Life Insurance Co. v. McConnell*, 52 Ala. App. 589, 296 So. 2d 183, 186 (1974)).

The contract between General American and Land & Associates was headed "Corporate General Agent's Contract." However, the body of the contract provided in part:

> "The General Agent shall have no power with respect to any contract to which the Company is, or purports to be a party, to make, alter or discharge such contract, or to waive any forfeiture or the performance of any of the terms or conditions of such contract."

The contract between General American and Foster was headed "Producer Agent's Contract." However, the body of the contract provided in part:

"Appointment

"Subject to all the terms and conditions of this contract, the General Agent [Land & Associates] does hereby appoint the Agent for the purpose of procuring in person applications for all forms of Individual Life Insurance, Fixed Annuities and Health Insurance listed in the applicable Schedule(s) appearing in the Company's [i.e., General American's] Agent's Contract Manual, hereinafter referred to as Manual, and offered by the Company, which the Agent is properly licensed to sell.

"Agent's Status

"None of the terms of this contract shall be deemed to create the relation of employer and employee between the General Agent and the Agent or between the Company and either the Agent or the General Agent; or to interfere with the freedom of the Agent's action as to the manner, time or place in which he conducts his business.

"Modification of Contracts: Compliance with Law

"The Agent shall have no power with respect to any contract to which the Company is, or purports to be a party, to make, alter or discharge such contract, or to waive any forfeiture or the performance of any of the terms or conditions of such contract. The Agent shall comply with all laws and regulations in effect within said territory relating to the business of insurance."

In *Washington National Insurance Co. v. Strickland*, 491 So. 2d 872 (Ala. 1985), Justice Houston, writing for the majority, set forth a discussion of the distinctions between brokers, agents, and soliciting agents:

"A 'general agent' is one who has authority to transact all of the business of the principal, of a particular kind or in a particular case. *Southern States Fire Insurance Co. v. Kronenberg*, 199 Ala. 164, 170-71, 74 So. 63, 67 (1917). The powers of such an agent are coextensive with the business entrusted to his care, authorizing him to act for the principal in all matters coming within the usual and ordinary scope and character of such business. *Id.*, 199 Ala. at 171, 74 So. at 67. A general agent has full power to bind the insurer to the agent's contract of insurance or to issue policies or to accept risks. *McGhee v. Paramount Life Insurance Co.*, 385 So. 2d 969 (Ala. 1980). In fact, a general agent 'stands in the shoes' of the principal for the purpose of transacting business entrusted to him. Since a general agent's powers are coextensive with the business entrusted to him, his fraudulent act is the fraudulent act of his insurer principal as well.

"An insurance company also has the right to employ agents with limited authority. *Robinson v. Aetna Insurance Co.*, 128 Ala. 477, 30 So. 665 (1901). A 'special agent' as distinguished from a 'general agent,' is authorized to act for the principal only in a particular transaction, or in a particular way. *Southern States Fire Insurance Co., supra*, 199 Ala. at 171, 74 So. 67. In the insurance context, the most prevalent type of special agent is the 'soliciting agent.' *A soliciting agent is different from a general agent in that he has no power to bind his insurer principal in contract. Watson v. Prudential Insurance Co.*, 399 So. 2d 285 (Ala. 1981). *However, when a soliciting agent commits a fraud upon one who seeks insurance coverage, his insurer principal will be liable for that fraud, if the fraud was perpetrated*

by the agent within the scope of his employment. The liability of an insurer for the fraudulent acts of its soliciting agents is grounded in the doctrine of 'respondeat superior,' and not the doctrine of agency. National States Insurance Co. v. Jones, 393 So. 2d 1361 (Ala. 1980). Since a soliciting agent is regarded as the 'servant' of the insurer 'master,' the insurer has the full right of control over the agent's actions. A general agent, however, stands in the shoes of the principal; his actions are regarded as those of the principal. The law deems the principal to have 'participated' in the fraud of its general agent, and so subjects the principal to direct liability. Where a soliciting agent commits fraud the insurer's liability is vicaroius, and the principal is liable in spite of the fact that he did not participate in the fraud, or even forbade it. *National States Insurance Co. v. Jones, supra*, at 1367.

"An independent agent or broker is usually not an agent for the insurer at all; rather, he is the agent of the insured. See Code 1975, § 27-7-1. For example, this Court has held that when an independent agent or broker fails in his duty to obtain insurance coverage, the principal may sue either for a breach of contract, or, in tort, for breach of duty imposed on the agent or broker to [use] reasonable skill, care, and diligence in obtaining insurance. *Highlands Underwriters Insurance Co. v. Elegante Inns*, 361 So. 2d 1060 (Ala. 1978). In *Highlands*, the principal was the insured."

492 So. 2d at 874-75 (emphasis added).

Simmons contends that Foster was the soliciting agent for both General American and Land & Associates. Land & Associates and General American argue that Foster was an independent agent, and that the doctrine of respondeat

superior does not apply because they did not exert sufficient control over the activities of Foster.

"The test to be applied in determining the existence of an agency relationship under the doctrine of respondent superior is whether the alleged principal reserved a right of control over the manner of the alleged agent's performance. However, the right to determine if an alleged agent is conforming to the requirements of a contract does not, in itself, establish control." *Carlton v. Alabama Dairy Queen, Inc.*, 529 So. 2d 921, 923 (Ala. 1988); *Wood v. Shell Oil Co.*, 495 So. 2d 1034, 1036 (Ala. 1986); *Williams v. Tennessee River Pulp & Paper Co.*, 442 So. 2d 20 (Ala. 1983). Furthermore, agency is not determined by how the parties characterize their relationship, but by the facts of each case. *Brown v. Commercial Dispatch Publishing Co.*, 504 So. 2d 245 (Ala. 1987); *Federal Land Bank of New Orleans v. Jones*, 456 So. 2d 1 (Ala. 1984).

The evidence at trial revealed that Land & Associates was a geographical brokerage agency for General American. While the contract between General American and Land & Associates referred to Land & Associates as a general agent, Ed Land, president of Land & Associates, testified that that company merely acted as a paper clearinghouse between agents and General American and that Land & Associates had no decisionmaking power with regard to the underwriting or acceptance of General American's policies.

Land testified that when Foster initially requested to sell General American policies, he conducted an investigation into Foster's background and forwarded the information resulting from that investigation to General American. It was General American, and not Land, he said, who decided to issue Foster a contract to sell General American's policies.

Foster testified that he was licensed to sell life and health insurance policies through many companies, includ-

ing General American. Foster received a manual from General American outlining the company's policies, and that manual was made part of his contract. Foster stated that when he sold a policy it was General American, not Land & Associates, who paid him.

General American had the authority to hire and fire its agents, to determine the methods by which they were trained, to issue its company training manuals, and to pay its agents their commissions. There is sufficient evidence in the record to support the jury verdict under the theory of respondeat superior in favor of Simmons against General American.

However, that result also compels us to conclude that there was insufficient evidence to support the jury verdict against Land & Associates. There was no evidence that Land & Associates served as anything other than a geographical brokerage agency for General American, or that Land & Associates exercised any control over Foster or functioned as anything more than a paper clearinghouse between General American and its soliciting agents.

II.

The defendants contend that Simmons failed to show that he had justifiably relied on the misrepresentations of Foster. Simmons admitted that he did not read the terms of the interim insurance application, but, instead, claimed to have relied upon Foster's assurance that his wife was covered immediately, provided his check "was good."

This Court has recently stated that reliance should be assessed by the following standard:

> "A plaintiff, given the particular facts of his knowledge, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant's representation if that

> representation is 'one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.' "

Hickox v. Stover, [Ms. 87-652, July 28, 1989] ___ So. 2d ___ , ___ (Ala. 1989), quoting *Southern States Ford, Inc. v. Proctor*, 541 So. 2d 1081, 1092 (Ala. 1989) (Hornsby, C.J. concurring specially). See also *Grimes v. Liberty National Life Insurance Co.*, [Ms. 87-1182, Sept. 15, 1989] ___ So. 2d ___ (Ala. 1989).

Simmons contends that, under the facts of this case, he was justified in relying on Foster's statement that his wife was covered because even if he had read the interim insurance application, he would not have been put on notice that Foster's representations were false. We agree.

The "Conditional Receipt and Interim Insurance Application" provided:

> "*CONDITIONS PRECEDENT*
>
> " . . . .
>
> "(6) Our underwriters must formally determine that on the latest of:
>
> "(a) the date of the Application Part I, or
>
> "(b) the date of the latest Application Part II, or
>
> "(c) the date of the latest medical examination or test we require, each proposed insured was acceptable to us under our rules, limits and standards. Each person must qualify for the exact plan and amount of insurance and for all supplemental riders applied for. Each person must also be insurable at least at our standard premium rates.
>
> "(7) No interim insurance will be in effect if any incorrect or untrue or incomplete statement of material fact is made on:

"(a) the Application Part I or Part II, or

"(b) any report of any examination or medical test submitted to us.

" . . . .

"*TERMINATION OF INTERIM INSURANCE*

"*Interim insurance shall terminate automatically without notice to anyone on the earliest of the following dates:*

"(1) The date we formally approve the exact policy(ies) applied for.

"(2) *The date we determine that you do not qualify as a standard risk and elect to terminate the interim insurance.*

"(3) The date we formally approve a policy:

"(a) on a different plan;

"(b) for a different amount;

"(c) with different benefit riders;

"(d) at a special risk classification; or

"(e) with any exclusion or impairment rider(s).

"(4) The date we formally determine not to offer any policy.

"(5) The beginning of the 90th day after the date of this Receipt." (Emphasis added.)

An annotation has explained the reasoning for these clauses as follows:

"Since, in the absence of a specific agreement, the payment of the first premium and the delivery of the policy are concurrent acts, a period intervenes between the signing of the application

by the applicant and the delivery of the policy. During this period no money has been advanced to the insurance company, and no insurance is in effect. This interval, of a few days to several weeks, depending upon the time consumed in investigation and physical examination of the applicant, in passing upon his application at the home office, is highly undesirable from the point of view of the insurer as well as of the applicant. The disadvantage to the applicant consists in the fact that he is not covered by insurance during this period, while the disadvantage to the insurer consists in the fact that during this period the applicant possesses the power to revoke the offer made in his application. This disadvantage is a very real one as far as the insurer is concerned, since if the applicant decides to exercise his power, either because he chooses not to carry any insurance at all, or because he chooses to purchase it of a rival company, the company suffers a loss of what it has expended for the investigation and medical examination for the applicant, aside from the loss of business itself.

"To obtain some measure of protection against the applicant's arbitrary withdrawal of his offer during the company's extensive investigation of his insurability, the insurance companies have hit upon the idea of issuing so-called binding receipts to the applicant upon the payment of the first premium. These binding receipts, or conditional binding receipts, as these instruments are sometimes, though less frequently, called, usually contain a provision which, in some instances, is duplicated in the application itself, to the effect that the insurance shall be considered as in force from the date of the receipt, or the date of the medical examination, provided the application is

> approved and accepted at the home office of the insurer. Sometimes the date of approval or of issuance of the policy is chosen as the date the policy shall become effective, and in some instances no condition is imposed upon the applicant. The exact language of these provisions varies greatly.
>
> "The issuance of these binding receipts effectively does away with the disadvantage threatening the insurer. They protect it in two ways: The applicant to whom the binding receipt is issued feels, as a rule, contractually obligated to perform and, should he withdraw his application, he is unlikely to resort to a lawsuit to recover the relatively small sum paid. In addition to achieving this primary object, the issuance of a binding receipt has the incidental advantage for the insurer that it serves to give the insurer the use of the premium money at the earliest possible date and that it offers a selling point of which no agent fails to make the utmost in his talks with prospective customers."

Annotation, *Temporary Life, Accident, or Health Insurance Pending Approval of Application or Issuance of Policy*, 2 A.L.R.2d 943 (1948) (footnote omitted). See also *Powell v. Republic National Life Insurance Co.*, 337 So. 2d 1291 (Ala. 1976); R. Keeton & A. Widies, *Insurance Law* (1988).

We think Simmons might have understood the phrase "[i]nterim insurance shall terminate automatically without notice to anyone . . . on [t]he date we determine that you do not qualify as a standard risk and elect to terminate the interim insurance" to mean that his wife was receiving temporary coverage that would terminate on the day she might be determined not to be a "standard risk," should such a determination be made. That clause, when coupled

with the conditional language in the "conditional receipt and interim insurance application" is not entirely clear.

In light of the foregoing, we find that the issue of whether Simmons justifiably relied on the misrepresentations of Foster was properly submitted to the jury. *Liberty National Life Insurance Co. v. Sherrill*, [Ms. 88-0069, July 28, 1989] ___ So. 2d ___ (Ala. 1989).

III.

The defendants contend that the trial court abused its discretion when it failed to grant a new trial on the grounds that three members of the jury panel who were eventually selected as jurors failed to disclose on voir dire that they had been involved in previous litigation. During voir dire, the venire was asked the following question by counsel:

> "Are any of you on the panel or any member of your immediate family ever been either a plaintiff—that is a claimant bringing a suit—or a defendant—that is a person against whom a suit is brought? Anybody fall in that category?"

In response to the question, one prospective juror responded that her former son-in-law had been a defendant in a criminal action, and another prospective juror answered that she and her husband had been involved in a breach of contract case.

After the trial, an investigation revealed that three of the jurors had been involved in events that called for an affirmative response. One of the jurors, Lucy Andrews, failed to disclose that in 1984 she sued an individual for personal injuries and property damage arising out of an automobile accident.

Another juror, Ronald Brockman, failed to disclose that he and his wife had been defendants in an action in district court on a promissory note brought by a finance company.

The proceeding had been stayed when Mr. Brockman and his wife filed a petition for bankruptcy.

Finally, a third juror, Michael Howard, failed to disclose that he had been sued in district court in a subrogation action brought by an insurer arising out of an automobile accident in 1985. A default judgment was entered against him in that action, and his wages were garnished to satisfy the judgment.

In regard to this issue, the trial court stated in its order denying the defendants' motion for new trial:

> "With respect to the former, the defendant General American has filed original and amended motions establishing that three persons eventually seated as jurors did not fully answer, or did not make any response to, certain voir dire questions. General American requested that these jurors be summoned to an evidentiary hearing. The Court has considered the matters contained in and the materials submitted with General American's motions and finds 'substantial temporal remoteness of the previous litigation to the present case, inadvertence on the part of these venire persons, or a misunderstanding—at least on their part—of the questions as they related to them personally.' *Ensor v. Wilson*, 519 So. 2d 1244 (Ala. 1987).
>
> "Jurors make substantial sacrifices to perform their duty, and the Court is not disposed to further impose on them where, as here, there has been no showing of probable prejudice. Therefore, General American's motion to have the jurors summoned to court and examined is denied. Plaintiff has filed affidavits of these jurors. The Court does not condone the taking of these statements, has not considered them in connection

with the instant motions and grants General American's motion to strike them."

The general rule is that in the trial of a case, the parties have a right to have their questions on voir dire answered truthfully, so as to enable them to exercise their discretion wisely in the use of their peremptory strikes. *Sanders v. Scarvey*, 284 Ala. 215, 224 So. 2d 247 (1969). The scope of review by this Court was stated in *Freeman v. Hall*, 286 Ala. 161, 166-67, 238 So. 2d 330, 335-36 (1970):

> "We hold that the proper inquiry for the trial court on motion for new trial, grounded on allegedly improper responses or lack of responses by prospective jurors on voir dire, is whether this has resulted in *probable prejudice* to the movant. This appears to be the general rule throughout the country [see Annotations, 38 A.L.R.2d 624, and 63 A.L.R.2d 1061]. In *Leach v. State*, 31 Ala.App. 390, 18 So. 2d 285 (1944), the then Court of Appeals said:
>
> > " ' " * * * the fact that a juror answered falsely as to his qualifications is a recognized ground for a new trial" * * *—we would say, of course *where there was probable prejudice to the defendant* by such juror's conduct. * * * ' [Emphasis supplied.]
>
> "There is broad support for the proposition that the trial court's application of the probable prejudice test is subject to review only for abuse of discretion. See Annotation, Effect of juror's false or erroneous answer on voir dire as to previous claims or actions against himself or his family, 63 A.L.R.2d 1061, 1063, where it is said:
>
> > " 'It has been recognized by those courts considering the question that whether or not the complaining party is or may have been

prejudiced by the juror's failure to answer properly the question addressed to him is a matter primarily for the trial court's discretion any [sic] power, not subject to reversal unless abused.'

"In *Peterson v. Skiles*, 173 Neb. 470, 113 N.W.2d 628, 636-637 (1962), the Supreme Court of Nebraska held, in a similar fact situation to the case at bar:

" ' * * * [T]he question as to whether or not the complaining party was prejudiced by the juror's failure to answer properly is a matter primarily within the discretion of the trial court. In the absence of a showing of an abuse of discretion the ruling of the trial court thereon will not be reversed. * * *'

"See also *Beggs v. Universal C. I. T. Credit Corporation*, 387 S.W.2d 499 (Mo. 1965); *Pearson v. Gardner Cartage Co.*, 148 Ohio St. 425, 76 N.E.2d 67 (1947), (Syllabus 2).

"This rule comports with logic and common sense. The trial judge heard the questions posed on voir dire and answers thereto. He is in the best position to make findings on the question of probable prejudice after the testimony it developed orally, or by affidavit, or new trial motion. His conclusions are then subject to our review for abuse of discretion.

"We said in *Morris v. Zac Smith Stationery Co.*, 274 Ala. 467, 470, 149 So. 2d 810, 813:

" 'The trial judge was present in court when the voir dire examinations took place; he was in position to observe the lawyers for both parties during their respective questions to the jurors on voir dire; he heard the tone of their

> voices and the time given between the questions that elicited answers from the jurors. The clarity of the questions propounded was also addressed to his judgment.' "

See also *Ensor v. Wilson*, 519 So. 2d 1244, 1263 (Ala. 1988); *Gold Kist, Inc. v. Brown*, 495 So. 2d 540 (Ala. 1986).

The trial court is in the best position to determine whether there was probable prejudice as a result of a juror's failure to respond to questions during voir dire. Because of the phrasing of the question asked during voir dire, it is understandable that the cause of the failure to respond was merely a misunderstanding on the part of the jurors. Under the facts of this case, we cannot say that the trial court abused its discretion in not granting the new trial for the failure of the three members of the jury panel to respond to the question addressed to them on voir dire.

IV.

The defendants next contest the punitive damages aspect of the case. The defendants argue that the punitive damages award in this case is unconstitutional and violates the fifth, eighth, and fourteenth amendments to the United States Constitution and Article 1, § 6, of the Alabama Constitution.[1]

The Supreme Court of the United States has recently held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S. Ct. 2909 (1989), that the excessive fines clause of the eighth amendment

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[1] The defendants also contend that the trial court erred in charging the jury that punitive damages could be awarded without a finding that the defendants intended to defraud or deceive the plaintiff. We need not reach this issue concerning the trial court's jury instruction, because it was not properly preserved for review pursuant to Rule 51, A.R.Civ.P.

does not apply to punitive damages awards in cases between private parties. Furthermore, this Court has consistently rejected the same arguments made by the defendants and has upheld the constitutionality of punitive damages. See *Pacific Mutual Life Insurance Co. v. Haslip*, [Ms. 87-482, Sept. 13, 1989] ___ So. 2d ___ (Ala. 1989); *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] ___ So. 2d ___ (Ala. 1989); *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989); *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1989); *United American Insurance Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989).

Furthermore, this Court has adopted guidelines to be used by the trial court in reviewing punitive damage awards. These guidelines are found in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493 So. 2d 1370 (Ala. 1986); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986); and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

Defendants argue that even though the trial court granted a remittitur in this case of $1.9 million, the amount of the verdict remains clearly excessive. We disagree.

The trial court entered an opinior according to the guidelines of the above cases. We agree that there was sufficient evidence to uphold an award of punitive damages in this case.

Finally, Simmons argues in his cross-appeal that the trial court erred in remitting the jury verdict to $600,000, and that the original jury verdict of $2.5 million should be reinstated. Simmons contends that the trial court erred in remitting the jury's verdict, because, he says, the judge remitted it simply because he felt that the jury awarded too much.

The trial judge entered an opinion wherein he complied with the guidelines of *Hammond v. City of Gadsden*, 493

So. 2d 1374 (Ala. 1986). The trial court's order stated in part:

> "Punitive damages cannot be excessive as a matter of law. The question here, then, is whether the award is the result of 'bias, passion, corruption, or other improper motive' on the part of the jurors. The Court will immediately reject bias and corruption, leaving passion or other improper motive. One of the defendants suggests passion, citing the fact that several jurors wept and hugged plaintiff after rendition of their verdict. However, this could as readily reflect sympathy for the manner in which plaintiff was treated on the stand as a passion to give him excessive amounts of defendants' money.
>
> "The problem here is that $2,500,000 is simply too much for the conduct of which defendants were guilty. The Supreme Court has said that if the amount of a verdict is greatly out of line, 'it is fair to infer, in the absence of extraordinary features, that some improper motive has led the jury astray.' *Alabama Power Co. v. Smith*, 273 Ala. 599, 142 So. 2d 228 (1962). The court makes that inference, recognizing full well that such improper motive is not 'established and reflected in the record,' as apparently required by *Hammond*.
>
> "In any event, after careful and thoughtful consideration, taking into account the gravity of the wrong, the nature and extent of the injury inflicted upon plaintiff, and upon making comparative analysis with other awards in similar cases, defendants' motions for a new trial or other relief are denied on the condition that plaintiff file with this court within 14 days a remittitur of damages in the sum of $1,900,000; otherwise, the motions will be granted."

We agree that the trial judge erred when he stated that the verdict was "simply too much for the conduct of which defendants were guilty." See *Western Super Markets, Inc. v. Keith*, 528 So. 2d 317 (Ala. 1988); *Stinson v. Acme Propane Gas Co.*, 391 So. 2d 659 (Ala. 1980); *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979). That error, however, was harmless, in light of the remainder of the trial court's order.

In *Green Oil Co. v. Hornsby*, supra, this court stated the following with regard to the trial court's remittitur and punitive damages:

> "What amount is sufficient to punish [the defendant] and to deter it, and others similarly situated, from committing similar acts in the further? Traditionally, the jury has been afforded a great deal of discretion in assessing punitive damages. *Roberson v. Ammons*, [477 So. 2d 957 (Ala. 1985)]. The exercise of that discretion is, of course, subject to judicial review to insure that it is not the result of bias, passion, prejudice, corruption, or other improper motive. *City Bank of Alabama v. Eskridge*, [521 So. 2d 931 (Ala. 1988)]. The trial court in the case at issue found that the verdicts were in no way affected by bias, passion, prejudice, corruption, or other improper motive or conduct. *This Court has recognized, however, that even though a jury verdict may not be excessive because it is the result of an improperly functioning jury, it is possible for a verdict to be excessive even when it is the result of a properly functioning jury.* See *City Bank of Alabama v. Eskridge*, supra. For example, in assessing punitive damages, the jury is not allowed to consider the financial position of the defendant, *Southern Life & Health Ins. Co. v. Whitman*, 358 So. 2d 1025 (Ala. 1978). The defendant's financial position is, however, a consideration essential to

> a post-judgment critique of a punitive damages award. *City Bank of Alabama v. Eskridge*, supra; see, also, *Hammond v. City of Gadsden*, [493 So. 2d 1374 (Ala. 1986)]. Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals."

539 So. 2d at 222 (emphasis added).

Moreover, damages are considered excessive if they "shock the judicial conscience of the court." *Southern Life & Health Insurance Co. v. Smith*, 518 So. 2d 77 (Ala. 1987); *Village Toyota Co. v. Stewart*, 433 So. 2d 1150, 1155 (Ala. 1983); *U-Haul Co. of Alabama v. Long*, 382 So. 2d 545 (Ala. 1980).

While the trial court stated that the verdict was not the result of bias, prejudice, or other improper motive, the judge did consider the gravity of the wrong and the nature and extent of the injury inflicted upon the plaintiff and made a comparative analysis with other awards in similar cases as required by *Green Oil*. Therefore, based on the foregoing, we cannot say that the trial court erred in ordering the remittitur.

87-1313 REVERSED AND REMANDED.

87-1320 AFFIRMED.

87-1331 AFFIRMED.

87-1339 AFFIRMED.

Hornsby, C. J., and Maddox, Jones, and Shores, JJ., concur.

Houston, J., concurs as to parts I and II; concurs specially as to part III; and concurs in the result as to part IV.

Steagall, J., concurs in part and dissents in part.

HOUSTON, JUSTICE (concurring as to parts I and II; concurring specially as to part III; and concurring in the result as to part IV).

I concur as to parts I and II.

I concur specially as to part III, just as I concurred specially when that same issue was presented in *Ensor v. Wilson*, 519 So. 2d 1244, 1274-75 (Ala. 1987).

If the trial court had granted a new trial for the failure of three members of the jury panel to respond correctly to questions addressed to them on *voir dire*, I would have voted to affirm the trial court's action. See *Gold Kist, Inc. v. Brown*, 495 So.2d 540 (Ala. 1986). The trial court is in the best position to determine whether there was probable prejudice as a result of a juror's failure to respond to questions asked during *voir dire*. The trial court's application of the probable prejudice test is subject to review only for abuse of discretion. Although I want our judicial system to do all in its power to make certain that jurors speak the truth during *voir dire*, just as witnesses must during their sworn testimony (see *Ex parte Frazier*, [Ms. 88-778, November 17, 1989] ___ So.2d ___ (Ala. 1989)), in regard to a juror's failure to so respond during *voir dire* our standard of review is that we will not reverse and remand for a new trial unless we find that, in applying the probable prejudice test, the trial court abused its discretion. I cannot hold that the trial court abused its discretion in not granting a new trial in this case.

I concur in the result as to part IV.

The argument of Simmons's most competent counsel, in brief and at oral argument, has overwhelmingly convinced me that the conduct of General American and Foster to-

wards Simmons on May 30, 1986, was substantially the same as that of Washington National and Palmer on January 15, 1981, towards Strickland in *Washington National Insurance Co. v. Strickland*, 491 So. 2d 872 (Ala. 1985), a case that I authored and with which I am thoroughly familiar. In *Strickland*, it was stipulated that the amount of compensatory damages was $1,369.14, so $21,130.86 of the $22,500 jury award was for punitive damages. In the case at issue, the trial court instructed the jury that $10,000 was the total amount of compensatory damages that Simmons could recover. There was no objection to this. The jury awarded $2.5 million, or $2,490,000 in punitive damages.

I have examined the jury instructions on punitive damages in both cases; they were substantially the same and consisted substantially of the instruction provided for in the Alabama Pattern Jury Instructions.

For the same conduct, within a five-year period, under the same jury instruction, one jury punishes one insurance company and its special agent in the amount of $21,130.86, and another jury punishes another insurance company and its special agent in the amount of $2,490,000. Two juries punished two insurance companies for the same conduct by verdicts that differed by $2,468,869.14. One is punished by having to pay approximately $15^1/_2$ times the compensatory damages that it caused; the other is punished by having to pay 249 times the compensatory damages it caused. Were Washington National and its special agent, Palmer, not punished enough? Or was General American and its special agent, Foster, punished too much? Take the even, or take the odd. The method of awarding punitive damages in Alabama is procedurally defective, perhaps to the extent of being unconstitutional as a matter of procedural due process, since in Alabama the constitutional right to due process applies in all civil actions as well as in criminal actions. *Ross Neely Express, Inc. v.*

Alabama Dept. of Environmental Management, 437 So. 2d 82 (Ala. 1983).

Punitive damages, primarily created by the judiciary, are out of hand. Considering *Washington National*, I cannot hold that the trial court in this case erred when it stated that the judgment was "simply too much for the conduct of which defendants were guilty."

Juries were allowed to award punitive damages at common law prior to the ratification of the United States Constitution and the first ten amendments to that Constitution and the ratification of the first Alabama Constitution. I am still confused as to the nature of those common law punitive damages, for it appears that they may have been utilized both to compensate the victim and to punish the wrongdoer. See L. Schlueter and K. Redden, *Punitive Damages*, § 1.3 (2d ed. 1989). However, I cannot find, regardless of the purpose for which such damages were awarded at common law, that the common law permitted a jury's award of punitive damages to be unbridled, unrestrained, unchecked, or ungoverned; however, if it did, I believe that the Alabama Constitution required that the substantive law of punitive damages be applied through fair procedures by a tribunal hearing the case and that this process constitutionally bridled, restrained, checked, and governed a jury's right to award punitive damages and that punitive damages may be unconstitutional unless they are awarded according to proper standards set by the judiciary or the Legislature.

There was a substantial remittitur, ordered in accordance with the only standards that this Court has provided, i.e., post-verdict standards to be applied by the trial court; therefore, being pragmatic, I concur in the result.

87-1313 Land & Associates, Inc. v. Simmons

87-1320 Foster v. Simmons

87-1331 General American Life Insurance Co. v. Simmons

87-1339 Simmons v. General American Life Insurance Co., et al.

STEAGALL, JUSTICE (concurring in part and dissenting in part).

I concur as to parts I, II, and IV; I respectfully dissent as to part III. I believe the trial court abused its discretion when it failed to develop testimony, either "orally, or by affidavit," before concluding that there was no probable prejudice resulting from the concealment of information by three jurors on voir dire. See *Freeman v. Hall*, 286 Ala. 161, 167, 238 So. 2d 330, 335 (1970).

The following is well settled in this state:

> "[P]arties have a right to have questions answered truthfully to enable them to exercise their discretion wisely in the use of their peremptory strikes. When jurors fail to answer questions correctly, a party is denied the exercise of that right.
>
> "Our courts have held that the concealment by a juror of information called for in voir dire examination need not be deliberate in order to justify reversal, for it may be unintentional, but insofar as the resultant prejudice to a party is concerned it is the same."

Sanders v. Scarvey, 284 Ala. 215, 219, 224 So. 2d 247, 251 (1969) (citations omitted).

Because I believe that the parties are entitled to have their questions on voir dire answered truthfully, I believe the trial judge should have developed testimony on which to base his ruling that there was no probable prejudice shown.

APPENDIX B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

87-1313

LAND & ASSOCIATES, INC. -
Appellant

v.

BRAD L. SIMMONS
Appellee

87-1320

WILLIE FOSTER
Appellant

v.

BRAD L. SIMMONS
Appellee

87-1331

GENERAL AMERICAN LIFE INS. CO.
Appellant

v.

BRAD L. SIMMONS
Appellee

87-1339

BRAD L. SIMMONS

Appellant

vs.

GENERAL AMERICAN LIFE INS. CO., ET AL.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

Application for rehearing overruled. No opinion written on rehearing.

Adams, J. - Hornsby, CJ., Maddox, Jones, Shores and Houston, JJ., concur.

* * *

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

4/12/90
bsa

APPENDIX C

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CASE NO: CV-86-002340

BRAD L. SIMMONS

Plaintiff.

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, et al.,

Defendants.

ORDER

This matter is before the Court on defendants' motions for judgment notwithstanding the verdict or for a new trial and various motions relating to voir dire examination of prospective jurors. The court has considered all of the grounds of the motions and will discuss two: the voir dire issue and the alleged excessiveness of the verdict.

With respect to the former, the defendant General American has filed original and amended motions establishing that three persons eventually seated as jurors did not fully answer, or did not make any response to, certain voir dire questions. General American requested that these jurors be summoned to an evidentiary hearing. The Court has considered the matters contained in, and the materials submitted with, General American's motions and finds "substantial temporal remoteness of the previous litigation to the present case, inadvertence on the part of these venire persons, or a misunderstanding—at least on their part—of the questions as they related to them personally." *Ensor v. Wilson*, 519 So. 2d 1244 (Ala. 1987).

Jurors make substantial sacrifices to perform their duty, and the Court is not disposed to further impose on them where, as here, there has been no showing of probable prejudice. Therefore, General American's motion to have the jurors summoned to court and examined is denied. Plaintiff has filed affidavits of these jurors. The Court does not condone the taking of these statements, has not considered them in connection with the instant motions and grants General American's motion to strike them.

The question of excessiveness is difficult. The Supreme Court of Alabama has affirmed punitive damages awards in bad faith or fraud claims against insurance companies of $3,000,000 (*American Pioneer Life Ins. Co. v. Sandlin*, 470 So. 2d 657 [Ala. 1985]) and $1,250,000 (*Nationwide Mut. Ins. Co. v. Clay*, 469 So. 2d 533 [Ala. 1985]). Also, it has affirmed orders of remittitur of $3,500,000 to $500,000 (*National States Ins. Co. v. Jones*, 393 So. 2d 1361 [Ala. 1980]) and $1,100,000 to $100,000 (*Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916 [Ala. 1981]).

More helpful is *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050 (Ala. 1987). *Lavoie* was a bad faith case with a $3,500,000 punitive damage award which had not been disturbed by the trial court. On remand from the Supreme Court of the United States, the Supreme Court of Alabama undertook to review the award as though it were the trial court. It ordered a remittitur of $3,000,000, saying that it had done so. "[a]fter careful and thoughtful consideration, taking into account the gravity of the wrong, the nature and extent of the injury inflicted upon the insureds, and, upon making a comparative analysis with other awards in similar cases."

It is assumed that the foregoing statement satisfies the directive in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), requiring "trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages."

It does not, however, address the following, also from *Hammond*:

> "We do emphasize, however, that only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive may a trial court order a new trial or remittitur. * * *"

Punitive damages cannot be excessive as a matter of law. The question here, then, is whether the award is the result of "bias, passion, corruption, or other improper motive" on the part of the jurors. The Court will immediately reject bias and corruption, leaving passion or other improper motive. One of the defendants suggests passion, citing the fact that several jurors wept and hugged plaintiff after rendition of their verdict. However, this could as readily reflect sympathy for the manner in which plaintiff was treated on the stand as a passion to give him excessive amounts of defendants' money.

The problem here is that $2,500,000 is simply too much for the conduct of which defendants were guilty. The Supreme Court has said that if the amount of a verdict is greatly out of line, "it is fair to infer, in the absence of extraordinary features, that some improper motive has led the jury astray." *Alabama Power Co. v. Smith*, 273 Ala. 599, 142 So. 2d 228 (1962). The court makes that inference, recognizing full well that such improper motive is not "established and reflected in the record," as apparently required by *Hammond*.

In any event, after careful and thoughtful consideration, taking into account the gravity of the wrong, the nature and extent of the injury inflicted upon plaintiff, and upon making a comparative analysis with other awards in similar cases, defendants' motions for a new trial or other relief are denied on the condition that plaintiff file with

this court within 14 days a remittitur of damages in the sum of $1,900,000; otherwise, the motions will be granted.

Dated this 23rd day of June, 1988.

/s/ Robert G. Kendall
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CASE NO: CV-86-002340

BRAD L. SIMMONS

Plaintiff,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, et al.,

Defendants.

AMENDED ORDER

The third paragraph of this Court's order of June 23, 1988, is amended to read as follows:

Jurors make substantial sacrifices to perform their duty, and the Court is not disposed to further impose on them where, as here, there has been no initial showing of probable prejudice. Therefore, the Court has denied General American's request to have the jurors summoned to Court. Further, the Court has not considered the affidavits of the jurors filed by plaintiff, it being the opinion of the Court that no burden of supporting the verdict has been shifted to plaintiff.

Dated this 5th day of July, 1988

/s/ Robert G. Kendall
CIRCUIT JUDGE

APPENDIX D

IN THE CIRCUIT COURT
IN AND FOR MOBILE COUNTY, ALABAMA

CIVIL ACTION NO: CV-86-002340

BRADIS L. SIMMONS,

Plaintiff,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, WILLIE FOSTER and LAND & ASSOCIATES,

Defendants.

MEMORANDUM BRIEF OF DEFENDANT GENERAL AMERICAN LIFE INSURANCE COMPANY IN SUPPORT OF MOTION FOR JNOV, OR IN THE ALTERNATIVE NEW TRIAL, OR REMITTITUR

WILLIAM M. LYON, JR.
CHARLES S. WILLOUGHBY
Attorneys for Defendant
General American Life Insurance Company

OF COUNSEL:

McFADDEN, LYON, WILLOUGHBY & ROUSE
718 Downtowner Boulevard
Mobile, Alabama 36609

* * *

ISSUE V: THE ASSESSMENT OF PUNITIVE DAMAGES BY THE JURY WAS UNCONSTITUTIONAL.

The award of punitive damages in this case is unconstitutional on due process grounds, as violative of the 5th

and 14th amendments to the Constitution of the United States and also Article I, §6 of the Alabama Constitution.

The award is further unconstitutional because it violates the excessive fines clause of the 8th amendment to the Constitution of the United States and Article I, §15 of the Alabama Constitution.

This Court is directed to excellent discussions of the subject of constitutionality. See: Wheeler, M., "The Constitutional Case for Reforming Punitive Damages Procedures", 69 Va. L. Rev. 269 (1983), Jeffries, J., "A Comment on the Constitutionality of Punitive Damages", 2 Va. L. Rev. 139 (1986). Massey, C., "The Excessive Fines Clause and Punitive Damages: Some Lessons From History", 40 Vand. L. Rev. 1234 (1987).

The due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States set minimum standards for any civil or criminal proceedings which are violated under the Alabama law applicable to this case. The lesser evidentiary standard of preponderance of the evidence, and the presence of unguided discretion in juries to award punitive damages results in unequal application of such damages and indeed arbitrary imposition thereof against defendants. Under the law of this case, the jury has complete and unbridled discretion to apply its own subjective values in awarding punitive damages without regard to any frame of reference such as statutory maximum to which comparison may be made.

In awarding remittitur of a verdict of punitive damage, the Court must make a possibly erroneous assumption that the same jurors resolved the liability and compensatory damages issues fairly, and were influenced by passion and prejudice *only* when considering punitive damages. The possibility of the issue of liability being tipped by passion and prejudice is so great that new trial is required.

In the above article, author Wheeler stated:

> "In sum, three modifications to prevailing punitive damages procedures can, taken together, ameliorate the problems that currently create a substantial and unnecessary risk that erroneous verdicts will result in punitive damages cases. The three are (1) to require the plaintiff to establish the requisite culpability by clear and convincing evidence; (2) to set a legislatively determined maximum on all punitive damages awards; and (3) to bifurcate punitive damages trials by trying punitive damages issues apart from all other issues. 69 Va. L. Rev. 269, at 303.

It is apparent that lack of guidelines in the instant case, coupled with the presence of bias, passion and prejudice resolved adversely against these defendants not only the issue of liability but the assessment and amount of punitive damages as well.

The Eighth Amendment excessive fines clause was intended as protection from all excessive monetary penalties. In the recent Georgia case of *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827 (Ga. 1988), the Supreme Court of Georgia held that a $5,000,000 punitive damages award was constitutionally excessive and was therefore stricken. The Court applied the excessive fines clause of the Georgia Constitution which is similar to Article 1, §15 of the Alabama Constitution, to-wit: "That excessive fines shall not be imposed . . ." The court in *Brown* did not address the due process issues in light of its holding on the excessive fines proved.

In conclusion, it is submitted that the instant punitive damage award is constitutionally unsupportable and must be stricken.

RESPECTFULLY SUBMITTED:

/s/ _____
WILLIAM M. LYON, JR.

OF COUNSEL:

McFADDEN, LYON, WILLOUGHBY & ROUSE
718 Downtowner Boulevard
Mobile, Alabama 36609

APPENDIX E

IN THE SUPREME COURT FOR THE STATE OF ALABAMA

CASE NOS: 87-1313, 1320, 1331

GENERAL AMERICAN LIFE INSURANCE COMPANY, et al
Appellants,

v.

BRAD L. SIMMONS,
Appellee

CASE NO: 87-1339

BRAD L. SIMMONS,
Cross Appellant,

GENERAL AMERICAN LIFE INSURANCE COMPANY, et al
Cross Appellees.

APPEALS FROM THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BRIEF OF APPELLANT GENERAL AMERICAN LIFE INSURANCE COMPANY

WILLIAM M. LYON, JR.
CHARLES S. WILLOUGHBY
Attorneys for General
American Life Insurance
Company

ORAL ARGUMENT REQUESTED

OF COUNSEL:
McFADDEN, LYON, WILLOUGHBY & ROUSE
718 Downtowner Boulevard
Mobile, Alabama 36609

* * *

ISSUE VII

THE ASSESSMENT OF PUNITIVE DAMAGES BY THE JURY WAS UNCONSTITUTIONAL UNDER THE FEDERAL AND STATE CONSTITUTIONS

* * *

Specifically, General American contends that the award of punitive damages violated the Due Process clause of the Fifth and Fourteenth Amendments, the Excessive Fines clause of the Eighth Amendment the Constitution of the United States and the Constitution of Alabama, and also Article 1 §6 of the latter.

The basis of such argument is that Alabama law is flawed in application because the jury has unlimited discretion and no defined standard by which to assess punitive damages. Without bifurcation of the fact finding process, wherein the liability issues are resolved prior to the testimony and decision relating to the calculation and imposition of punitive damages, fundamental fairness to the defendant is lost and thereby due process under the Fifth and Fourteenth Amendments cannot be granted. Further, the unlimited discretion of juries to award punitive damages without reference to an ascertainable standard is violative of the Eighth Amendment.

The Eighth Amendment of the United States Constitution specifically provides that:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted. U.S. Amend.VIII.

Similarly, Section 15 of Article I of the Alabama Constitution provides:

> That excessive fines shall not be imposed nor cruel or unusual punishment inflicted.
>
> Ala.Const.Art.I 15.

The appellant is aware of the recent decision of this Court in *Industrial Chemical and Fiberglas v. Chandler* (Ms. 86-381 and 86-385, Sep. 30, 1988), which held inapplicable the Excessive Fines Clause of the United States Constitution to punitive damages in wrongful death cases arising in this state. For reasons addressed below, Defendant respectfully disagrees with the conclusion of this court in *Chandler*, and submits that this Court should reconsider its position on this issue. Alternatively, Defendant submits that *Chandler* should be limited to punitive awards in wrongful death cases. In any event, General American urges that this Court follow the Georgia Supreme Court which recently held that is own constitutional provision concerning excessive fines (identical to Alabama's) applied, and struck an award of $5,000,000.00 in punitive damages. *Colonial Pipeline v. Brown*, 365 S.E.2d 827 (Ga. 1988)

Appellant believes that neither the United States Supreme Court nor this Court has construed the Excessive Fines clauses of the respective constitutions in the context here presented. The Supreme Court Marshall, J., recently noted that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases—is a question of some moment and difficulty". *Banker's Life & Casualty Co. v. Crenshaw*, 100 L.E.2d. 2d 62, 73 (1988). In that case, the Court declined, as a matter of prudential consideration, to address the issue since it

was not properly "pressed or passed upon" in the state court.

Excessive fines are clearly prohibited by the Eighth Amendment. Since the Alabama law characterizes punitive damages as punishment and permits their assessment for deterrence, they are clearly penal, regardless of the fact that they arise in a civil case. In *Trop v. Dulles*, 356 U.S. 86 (1958) Chief Justice Warren stated:

> "If the statute imposes disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc.,—it has been considered penal." [at 96]

The Supreme Court has also noted that "Some punishments, though not labeled 'criminal' by the state, may be sufficiently analogous to criminal punishment in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977), (White, J., dissenting) See also *In re Gault*, 387 U.S. 1 (1967). Because they are penal in nature, punitive damages have been characterized by the Supreme Court as "private fines levied by civil juries." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). As Justice Marshall observed in dissent in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) punitive damages "serve the same function as criminal penalties and are in effect private fines." But, as Justice Rehnquist observed in *Smith v. Wade*, the purpose of punitive damages are not to right any wrong to the plaintiff; indeed, Justice Rehnquist noted that, in theory, punitive damages should be paid to the State, not the plaintiff. 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). This Court has the opportunity in the case at bar to recognize and implement a limiting principle under which the passions and prejudices of jurors may be constrained under an even-handed, objective and easily administered rule based upon the proportionality requirement of the Eighth Amendment. Ap-

plying the decision in *Solem v. Helm*, 463 U.S. 277 (1983), proportionality under the Excessive Fines Clause should be measured by looking to the following objective factors: 1) the gravity of the offense and the harshness of the punitive damage award; 2) the monetary penalties authorized by the legislature of this State and indeed other states for the same or similar conduct. Without proportionality, due to the unbridled discretion and unlimited amount of punitive damages which could be assessed by a jury, it is no surprise that the system would exact excessive punishments "based upon the caprice and prejudice of jurors". *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

The ratio between the amounts established by the Alabama legislature for criminal business fraud demonstrate the grossly disproportionate relationship to the punitive damage award in this case, even after application of remittitur.

General American could have expected the application of all of the federal and state constitutional privileges if it had been charged with conspiracy and business fraud under the Alabama criminal statutes, and if found guilty could have anticipated a maximum monetary penalty of One Thousand Five Hundred and No/100 ($1,500.00) Dollars. See, e.g., §§ 13A-4-3, A13A-5-12, 13A-9-41, *et. seq.* Code of Alabama (1975).

General American's civil trial was, of course, "unaccompanied by the types of safeguards present in criminal proceedings." *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, Jr., dissenting). And in the absence of these safeguards, a fine, even after remittitur, of four hundred (400) times the maximum fine authorized by the Alabama legislature for conspiracy and business fraud was imposed on General American.[3] Obviously, prior to its agent engaging in the

[3] §13A-4-3 criminal conspiracy (Class C misdemeanor); §13A-9-41 pro-

conduct in this case, General American could not have known in advance the penalty.

A comparison with the federal Racketeer Influenced and Corrupt Organizations Act, (RICO) 18 U.S.C. §§ 1961-68, would provide essentially the same result. A private litigant may bring a civil action under RICO to recover treble damages and recover attorney's fees for "racketeering" conduct. The damages in this case are non-existent since the plaintiff received a refund of his premium together with six (6%) percent interest. [R. 285, 296, Plaintiff's Exhibit 14]. *Southern Life Insurance v. Smith*, 518 So. 2d 77 (Ala. 1987)

The due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States set minimum standards for any civil or criminal proceedings which are violated under the Alabama law applicable to this case. In a criminal proceeding the standard for conviction is well known to be 'beyond a reasonable doubt.' In this civil proceding the lesser evidentiary standard or 'preponderance of the evidence' was utilized. Since the imposition of punitive damages in this case as remitted greatly exceeds the maximum criminal fine attributed to similar conduct by the Alabama legislature, *supra* at footnote, the verdict is constitutionally unsupportable.

Neither the remedy afforded by Congress, nor by the Alabama legislature would presumably come within one/four hundreth of what the trial court has left standing in this case. As such the verdict as remitted cannot stand muster under the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States nor the relevant portions of the Alabama constitution.

No one would seriously argue that in a criminal case, upon conviction, the jury should have the unlimited power

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vides that deceptive business practices is a Class B misdemeanor; §13A-5-12 prescribes that the maximum fine for a Class B misdemeanor is $1000 and $500 for a a Class C misdemeanor.

to assess whatever punishment it deemed appropriate. This would certainly violate Due Process, because prior to engaging in such conduct, the defendant could not know of the penalty for such action. The same is true with regard to our current civil system which allows juries to assess unlimited punitive damages in their sole discretion. The presence of such unguided discretion results in unequal application of such damages and indeed arbitrary imposition thereof against defendants. Under the law of this case, the jury has complete and unbridled discretion to apply its own subjective values in awarding punitive damages without regard to any frame of reference such as statutory maximum to which comparison may be made.

In awarding remittitur of a verdict assessing punitive damages, the Court must make a possibly erroneous assumption that the same jurors resolved the liability and compensatory damages issues fairly, but were influenced by passion and prejudice *only* when considering punitive damages. The possibility of the issue of liability being tipped by passion and prejudice is so great that new trial is required.

In his article *The Constitutional Case for Refining Punitive Damages Procedures*, supra, author Wheeler stated:

> "In sum, three modifications to prevailing punitive damages procedures can, taken together, ameliorate the problems that currently create a substantial and unnecessary risk that erroneous verdicts will result in punitive damages cases. The three are (1) to require the plaintiff to establish the requisite culpability by clear and convincing evidence; (2) to set a legislatively determined maximum on all punitive damages awards; and (3) to bifurcate punitive damages trials by trying punitive damages issues apart from all other issues. 69 Va. L. Rev. 269, at 303.

General American respectfully submits that the failure of the trial court to adhere to the foregoing standards,

under the circumstances of this case renders the award of punitive damages unconstitutional.

It is apparent that lack of guidelines in the instant case, coupled with the presence of bias, passion and prejudice, resolved adversely against the defendant not only the issue of liability but the assessment and amount of punitive damages as well.

In conclusion, it is submitted that the instant punitive damage award is constitutionally unsupportable and must be stricken.

* * *

(2)

No. 90-73

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In The

Supreme Court of the United States

October Term, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

BRAD L. SIMMONS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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BRAD L. SIMMONS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner General American's statement of the case mischaracterizes the relationship it enjoyed with its agent, Willie Foster. Petitioner refers (Pet. at pp. i and 2) to Foster as an "independent contractor" and "independent agent". Petitioner insists on this nomenclature even though the Alabama Supreme Court, applying settled principles of state law not challenged here, expressly found that Foster was acting within the line and scope of his employment as a *soliciting* agent when he defrauded respondent Simmons. In fact, by written contract, General

American expressly appointed Foster "for the purpose of *procuring in person applications for all forms of Individual Life Insurance. . . .* " App. A, 6a. In addition, petitioner trained Foster in selling its insurance and issued Foster a company training manual outlining petitioner's policies. App. A, 10a. It is crucial to understand that, despite petitioner's attempt in its written contract to disclaim any agency relationship with Foster, the jury found as a matter of fact that Foster was acting as an employee of petitioner at the time he defrauded Simmons. App. A, 10a.

A. The Fraud Perpetrated Against Respondent

On May 7, 1986, petitioner's agent visited Simmons at his workplace to discuss burial insurance for Simmons' wife. Unable to sell Simmons a burial insurance policy, Foster offered Simmons a $10,000 life insurance policy issued by petitioner General American. Foster gave Simmons an application for his wife to complete and sign. App. A, 2a.

Shortly thereafter, on May 30, 1986, Foster returned to Simmons' workplace to obtain the completed application and collect the annual premium. Upon receipt of the application, Foster issued Simmons a policy of "interim insurance" which was designed to temporarily insure Mrs. Simmons until General American issued the actual policy or determined that she was not insurable. The interim insurance policy expressly stated that the interim insurance did not terminate until "the date we [General American] determine that you do not qualify as a standard risk and elect to terminate the interim insurance." In

response to a direct question concerning when coverage became effective, Foster told Simmons that his wife was covered "[j]ust as soon as I get that [premium] check, if it's any good."[1] Simmons paid Foster the entire annual premium for the insurance at that time. App. A., 2a and 10a.

Approximately one month later, on July 4, 1986, Mrs. Simmons died from a heart attack. As of the date of Mrs. Simmons' death, General American had not yet issued an insurance policy and, more importantly, had not determined that Mrs. Simmons did "not qualify as a standard risk", as required by the interim insurance policy.

Simmons filed a claim with General American on July 18, 1986. General American refused to pay under the interim insurance policy because it claimed the interim insurance did not become effective *until it was determined* that an applicant qualified as a "standard risk". Because General American had not made its determination with respect to Mrs. Simmons until after her death, it claimed Mrs. Simmons was not covered under the interim insurance policy. App. A, 3a. In short, General American took the position that the interim insurance policy did not provide any "interim" insurance at all.

B. The Jury Verdict

Simmons sued General American and its soliciting agent, Foster, for breach of contract and for intentional

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[1] Foster made this representation knowing the interim insurance was subject to numerous terms and conditions.

and reckless misrepresentation. Simmons claimed $10,000.00 in compensatory damages under both the contract and fraud counts. App. A., 25a. The trial court instructed the jury, without objection, that Mr. Simmons' compensatory damages for fraud were $10,000.00. App. A, 25a. The jury returned a general verdict against both General American and Foster on the fraud count, and assessed damages in the amount of $2.5 million. The trial court denied petitioner's motion for new trial and remittitur "on the condition that [Simmons] file with this court within 14 days a remittitur of damages in the sum of $1,900,000 . . . . " App. C, 33a. Simmons accepted the trial court's remittitur of damages.

C. Review by the Alabama Courts

Upon petitioner's motion for new trial and remittitur, the trial court carefully reviewed the evidence and the jury's verdict pursuant to the common law procedures set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). App. C, 31a-33a. At this point, petitioner was free, indeed obligated, under Alabama law to offer evidence that the jury's verdict would punish the defendant more severely than was warranted by its misconduct. *McDowell v. Key, supra*, 557 So.2d at 1249. However, petitioner offered no evidence whatsoever as to the financial or other impact the jury's award would or could have on petitioner.

Nevertheless, following a hearing on petitioner's motion for new trial and remittitur, the trial court independently determined, based upon its review of the evidence offered at trial, that the jury's award of $2.5 million

was "too much for the conduct of which the defendants were guilty". App. C, 32a. The trial court also compared the jury's verdict with other awards in similar cases. App. A, 23a. Based on these findings, the trial court conditioned the denial of petitioner's motion for new trial upon Simmons' acceptance of a remittitur of more than 75% of the jury's verdict.

Following the trial court's review of the punitive damages award, the Supreme Court of Alabama conducted a *de novo* review of the jury's verdict and the trial court's ruling and compared the award with awards in similar cases. After comparing the remitted award with awards in similar cases, and considering the gravity of the wrong, the Alabama Supreme Court affirmed the trial court's remittitur. All seven justices sitting on the case agreed that the amount of punitive damages, as remitted, was not excessive or disproportionate to the wrong committed by defendants.

SUMMARY OF THE ARGUMENT

Petitioner proposes to raise substantial constitutional challenges to the assessment of punitive damages against a principal under the doctrine of *respondeat superior*. However, as petitioner admits, no such issues were raised in any of the courts below. In the courts below, petitioner challenged only the *factual* basis for the imposition of *liability* under the doctrine of *respondeat superior*. Petitioner did not invoke, expressly or by implication, the Due Process Clause or the constitutionality of punishing a principal for the acts of an agent. As admitted in the

petition, petitioner's arguments constituted only a "state law challenge". Consequently, neither of the courts below considered this issue. Due to the absence of a properly developed record with respect to this important issue, this Court should deny review.

With respect to the two remaining questions petitioner proposes, Rule 17 provides that review on writ on certiorari will be granted "only when there are special and important reasons therefor." None of the considerations enumerated in Rule 17 are presented by General American's petition. The Alabama Supreme Court's decision does not conflict with the decision of a Federal Court of Appeals or any state court of last resort. Nor does the decision conflict with any decision of this Court. More importantly, the Alabama Supreme Court has not decided "an important question of federal law which has not been, but should be, settled by this Court. . . . " This Court has addressed the precise issue raised by petitioner, including one case from the state of Alabama. *See, Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112 (1927).

Although this Court has indicated that the imposition of punitive damages in the absence of adequate legislative or common law standards may raise a substantial constitutional issue, *cf. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2902 (1989), the present case is not an appropriate setting for considering that issue. The procedures applied in punitive damages cases in Alabama are far from standardless; the jury's discretion is substantially confined and is subjected to searching *de novo* scrutiny both at the trial and on appeal. Additionally, Alabama in 1987 enacted comprehensive "tort reform" legislation that places a ceiling on punitive

damages in most cases, drastically narrows the imposition of vicarious liability for punitive damages, and imposes numerous other procedural safeguards. Ala. Code §§ 6-11-20 through 6-11-30 (1987). These provisions are not applicable to the present case – which was brought before the effective date of the legislation – but they render petitioner's challenges to Alabama's system for imposing punitive damages of historical interest only.

Petitioner seeks review of a jury's verdict which has already been drastically remitted (over 75%) by the trial court. Not only is the process which was afforded petitioner more than adequate to satisfy the Due Process Clause, but the very substantial remittitur afforded defendant in this case demonstrates that Alabama's process of awarding and reviewing punitive damages protects defendants from arbitrary or excessive jury verdicts.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO TIMELY AND PROPERLY RAISE ANY FEDERAL CONSTITUTIONAL CHALLENGES TO THE IMPOSITION OF PUNITIVE DAMAGES AGAINST A PRINCIPAL UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

Petitioner proposes to raise substantial constitutional challenges to the assessment of punitive damages against a principal under the doctrine of *respondeat superior*. However, as petitioner admits, no such issues were raised in any of the courts below. Pet. at p. 12, n. 7. In the courts below, petitioner challenged only the *factual* basis for the imposition of *liability* under the doctrine of *respondeat*

superior. Petitioner did not invoke, expressly or by implication, the Due Process Clause or the constitutionality of punishing a principal for the acts of an agent. As admitted in the petition, petitioner's arguments constituted only a "state law challenge". Pet. at p. 8. Consequently, neither of the courts below considered this issue.

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. . . . [T]his is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' "

Singleton v. Wulff, 428 U.S. 106, 120 (1976) (citation omitted).

Petitioner suggests (Pet. at 12, n. 7) that this issue "may be noticed by this Court in light of the grant of certiorari in *Pacific Mutual* [*v. Haslip,* 110 S.Ct. 1780 (1990)] and the fact that, given the resolution of this question by the Supreme Court of Alabama in *Pacific Mutual,* petitioner's additional reliance under the Due Process Clause would have been a futile act." Petitioner's assertion that raising this issue in the courts below would have been a "futile act" is spurious.

The Alabama Supreme Court did not release the decision in *Pacific Mutual* until September 15, 1989, three and one-half months after all appellate briefs were submitted to that court in the instant case. *See Pacific Mutual Life Ins. Co. v. Haslip,* 553 So.2d 537 (Ala. 1989). In other words, the Alabama Supreme Court had not issued a ruling on

this issue until well after petitioner's counsel had submitted its written briefs in this case.

Even if petitioner had attempted to raise this issue for the first time on appeal before the Alabama Supreme Court, that court would have denied review. Under settled Alabama law, a party "cannot 'invoke action by a court and have a case tried on certain issues and then later, when dissatisfied with the result, raise an entirely new issue, such as the constitutionality of the statutes under which he was proceeding. . . .' " *Alabama Power Co. v. Capps*, 519 So.2d 1328, 1330 (Ala. 1988), *quoting, Talley v. A&M Construction Co.*, 284 Ala. 371, 373, 225 So.2d 359, 360 (1969), *cert. denied*, 397 U.S. 995 (1970). In Alabama, constitutional issues cannot be raised for the first time on appeal. *Hicks v. Huggins*, 405 So.2d 1324 (Ala. Civ. App.), *cert. denied*, 405 So.2d 1328 (Ala. 1981); *Marion v. Hall*, 429 So.2d 937 (Ala. 1983).

Because petitioner failed to raise any constitutional challenge, this Court should follow its customary practice of refusing to grant review on questions "not pressed or passed upon below". In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62 (1988), this Court noted that it declines to exercise its certiorari jurisdiction under circumstances very similar to the instant case.

> "In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the 'not pressed or passed upon below' rule. These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. See, *Webb v. Webb, supra*, at 500-501, 68 L.Ed.2d 392, 101

> S.Ct. 1889. Because the chief issue appellant would have us resolve – whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases – is a question of some moment and difficulty, these policies apply with special force. See, *Illinois v. Gates, supra,* at 224, 76 L.Ed.2d 527, 103 S.Ct. 2317 ('where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion'); *Mishkin v. New York,* 383 U.S., at 512-513, 16 L.Ed.2d 56, 86 S.Ct. 958 ('The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision')."

Id. at 79, 100 L.Ed.2d at 72-73. The factors which led this Court to deny review of difficult constitutional issues in *Crenshaw* are present with respect to at least one of petitioner's proposed issues. Petitioner has offered no compelling reason why the principles which led this Court to deny review in *Crenshaw* should not be followed in the instant case.

Petitioner's failure to timely raise this issue below has resulted in the complete absence of a properly developed record. In the absence of such a record, the difficult constitutional question proposed to be raised by petitioner would be made even more difficult. As noted in *Crenshaw,* this Court adheres *scrupulously* to the customary limits on its discretion when difficult and important issues are involved. The issue raised by petitioner is certainly difficult and should not be reviewed in this case.

II. PETITIONER'S REMAINING DUE PROCESS CHALLENGES DO NOT MEET THE REQUIREMENTS OF RULE 17.

Petitioner proposes to challenge the award of punitive damages on the ground the award was the product of standardless, arbitrary jury decision-making. There is no prior, controlling opinion of this Court that is inconsistent with the Alabama Supreme Court's decision in this case, and no conflict between the decision below and any other state supreme court or federal court of appeals. *See, Jaffree v. Board of School Commn'rs of Mobile County,* 459 U.S. 1314 (1983); *Pacileo v. Walker,* 446 U.S. 1307 (1980).

In fact, the Alabama Supreme Court's decision is consistent with the decisions of this Court and other state and federal courts. In *Standard Oil Co. v. Missouri,* 224 U.S. 270 (1912), this Court explicitly rejected a challenge indistinguishable from the one General American now raises. Upholding a civil fine, the Court turned aside a due process claim that there was "any invalidity in the judgment because there was no statute fixing a maximum penalty [and] no rule for measuring damages." *Id.* at 285. In addition, in *Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112 (1927), this Court upheld an Alabama statute authorizing punitive damages for wrongful death against a claim that it denied due process because the jury may "fix the penalty according to its unbridled discretion, without any method of ascertainment, and without any limit to the amount it may impose by way of punishment or penalty upon defendant." Brief for Plaintiff in Error in No. 171, at 6. Hence, the Alabama Supreme Court has not decided "an important question of federal law which has

not been, but should be, settled by this Court. . . . " S.Ct. R. 17.1(c).

Moreover, the Alabama Supreme Court's decision does not conflict with the decision of the Federal Court of appeals or any state court of last resort. S. Ct. R. 17.1(b). Every state and federal court to have considered the question has likewise ruled that the common law method for assessing punitive damages satisfied due process.[2]

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[2] In *McCutchen v. Liberty Mutual Ins. Co.*, 699 F. Supp. 701, 709 (N.D. Ind. 1988), the court emphasized that "since the earliest of times, Indiana has recognized the need to have juries exercise the discretion which defendant now criticizes," *citing Tabor v. Hutson*, 5 Ind. 322 (1854). *Cf. F.D.I.C. v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990) (standards governing the jury's assessment of punitive damages are purposefully flexible to permit the jury to achieve community consensus). Several courts have noted the complete lack of precedent supporting a due process challenge to common law assessment of punitive damages. *See Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 3265 (1989); *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 (N.D. Ill. 1990); *McCutchen v. Liberty Mutual Ins. Co., supra.*

Several cases have upheld the constitutionality of common law standards no more specific than those in this case. *See, Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Hawaii 1989) (degree of wrongdoing and amount required to punish); *F.D.I.C. v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1524 (1990) (amount sufficient to punish and deter); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989) (reasonable sum to set an example and punish); *Puppe v. A.C. and S., Inc.*, 733 F. Supp. 1355 (D.N.D. 1990) (amount needed to deter); *Potomac*

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Because the petition fails to meet the criteria enumerated by this Court in Rule 17 for the granting of petitions of certiorari, the instant petition should be denied.

III. PLENARY REVIEW WILL NOT RESULT IN THE ESTABLISHMENT OF PRINCIPLES OF CONSTITUTIONAL LAW APPLICABLE BEYOND THIS CASE BECAUSE THE LEGAL STANDARDS AT ISSUE WERE UNIQUE TO ALABAMA AND HAVE BEEN SUPERSEDED BY LEGISLATIVE ENACTMENT.

Plenary review of this case is inappropriate because the Court would be reviewing a system for assessing punitive damages that no longer exists in Alabama or anywhere else.

In 1987, Alabama enacted tort reform legislation placing new and extensive substantive and procedural constraints on punitive awards. In particular:

1. Plaintiffs must meet a burden of "clear and convincing" evidence;

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Electric Power Co. v. Smith, 79 Md. App. 591, 558 A.2d 768 (1989) (amount sufficient to punish and deter). Other cases involved common law standards comparable to those governing the trial court's review of the award in this case. *See Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989); *Horowitz v. Schneider National, Inc.*, 708 F. Supp. 1573 (D. Wyo. 1989); *Guy v. Commonwealth Life Ins. Co.*, 698 F. Supp. 1305 (N.D. Miss. 1988), *aff'd in relevant part*, 894 F.2d 1407 (5th Cir. 1990).

2. Punitive damages may be awarded only where conscious or deliberate conduct is at issue;

3. No presumption of correctness is accorded by the trial court to the jury's decision respecting punitive damages, nor by the appellate court to any trial court rulings;

4. If the jury awards punitive damages, either party may move the trial court for a hearing or the admission of additional evidence on the propriety of the award. Any relevant evidence is admissible, including "the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether the defendant has been guilty of the same or similar acts in the past, the nature and extent of any effort by the defendant to remedy the wrong, and the opportunity or lack thereof the plaintiff gave the defendant to remedy the wrong complained of";[3]

5. Punitive damages may not be awarded against a principal for conduct of the agent unless the principal has ratified, endorsed or benefited from the agent's conduct; and,

6. Punitive damages have, with very limited exceptions, been capped at $250,000.

Ala. Code §§ 6-11-20 through 6-11-30. Although those legislative provisions did not apply to the present case, they have been applied in force in Alabama for more than three years and will govern all present and future actions raising punitive damages claims like those at issue here.

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[3] Similar protections had been established by the Alabama Supreme Court as a matter of common law in *Hammond* and were followed in this case.

A ruling on the Alabama safeguards in effect before this tort reform legislation would thus provide little guidance as to the constitutionality of Alabama's current procedure.

Nor would a ruling in this case provide guidance as to the procedures currently in effect in *other* States. To respondent's knowledge, no state makes use of a configuration of common law substantive limitations and procedural checks on jury discretion similar to those in force in Alabama at the time this case was reviewed by the lower courts. Before the effective date of the tort reform legislation, Alabama law bifurcated punitive damages decisions. In making initial assessment, juries were required to evaluate the gravity of the wrong at issue and the extent to which punitive damages were needed to deter similar wrongs. *See Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). To prevent bias, all evidence of the plaintiff's and defendant's financial condition was inadmissible. *See Southern Life & Health Ins. Co. v. Whitman*, 358 So.2d 1025 (Ala. 1978).

In cases in which juries awarded punitive damages, the trial court was required to conduct a post-verdict evidentiary hearing, applying substantive criteria identified by the Alabama Supreme Court. *See Hammond*, 493 So.2d at 1378-79. The trial court was also required to make written findings stating reasons for accepting or modifying the jury verdict, and these findings were subject to *de novo* review by the Alabama Supreme Court. *See Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989).

Because no other State uses this constellation of safeguards against improper punitive damage awards, plenary review of this case would provide minimal guidance as to the constitutionality of *other* States' procedural and substantive safeguards. General American's challenge to the Alabama law in force in 1987 thus presents no issues of national significance, and no issues of continuing significance even within Alabama. At bottom, General American seeks review of fact-bound, historical questions relevant to no one but itself. These considerations make review particularly inappropriate. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (" '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . . ") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

IV. RESPECT FOR ONGOING STATE REFORM EFFORTS AND RECENT EVIDENCE ABOUT THE ACTUAL IMPACT OF PUNITIVE DAMAGES CASTS DOUBT ON THE WISDOM OF CONSTITUTIONALIZING PROCEDURAL REQUIREMENTS FOR PUNITIVE DAMAGES AWARDS.

Although this Court has indicated that plenary review may be warranted to determine the constitutionality of punitive damages awarded in the absence of legislative or common law standards, fundamental notions of judicial restraint and federalism counsel against review.

First, the factual assumption that runaway juries are awarding punitive damages bearing no reasonable or predictable relationship to harm inflicted by defendants is open to serious question. A very recent empirical analysis by the American Bar Foundation found *no* substantial increase in either the frequency or the amount of punitive awards. S. Daniels & J. Martin, *Myth and Reality in Punitive Damages*, 34, 41-45 (ABF Working Paper #8911). Based on a careful nationwide survey of tens of thousands of verdicts, the study found that: the principal empirical claims made by General American are "distorted"; "the general pattern is one of low to modest awards"; and "punitive damages were awarded infrequently." *Id.* at 34, 41-45. The study warned that any judicial and legislative "reforms" of punitive damages systems "are likely to be . . . based on an unfounded (and perhaps manufactured) notion of a crisis." *Id.* at 62-64.[4]

In 1989, the United States General Accounting Office published a study likewise concluding that punitive awards correlated strongly with the size of compensatory awards, and that appellate review provided a substantial, well-functioning safeguard against excessiveness. *See* Products Liability: Verdict and Case Resolution in Five States (GAO/HRD-88-99, Sept. 1989) at 29, 31-32, 41, 69. A special committee of the American Bar Association also recently found "no clear evidence of a present or impending crisis in punitive damages." *Punitive Damages: A Constructive Examination*, at 1-2 (Report of the Special

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[4] This study will be published in the October 1990 issue of the Minnesota Law Review.

Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986).

Hence, no clear consensus exists on the nature or extent of the problem, or on what substantive standards and procedural mechanisms, if any, should be required. Issues this complex and controversial are far better resolved through the legislative process after appropriate legislative fact-finding. Defendants like General American have ample access to the legislative process so there is no need for this Court to intervene to correct for failure of that process. Tort reform like that enacted in Alabama and elsewhere is substantial evidence that petitioner and other potential defendants are fully able to protect their interests in the legislative arena.

Second, review by this Court would pretermit an active re-examination underway in the States. Since the Court's first expression of concern about punitive damages in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828 (1986), and its subsequent invitation to the States in *Bankers' Life* to "enact legislation addressing punitive damage awards," *Bankers' Life,* 108 S.Ct. at 1651, the majority of states, including Alabama, have enacted substantial legislative reforms designed to limit awards of punitive damages[5] – and other states are

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[5] *See* Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986); Conn. Gen. Stat. § 52-240(b) (Supp. 1989) (applicable to product liability cases); Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat.

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considering such reforms. This ongoing nationwide effort by state legislatures makes it unnecessary and inappropriate for the Court to interfere – particularly in a State, like Alabama, in the forefront of legislative reform.

State legislatures have enacted a broad range and variety of measures to guide the award of punitive damages. Of the forty-five states that permit an award of punitive damages,[6] twenty (including

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ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537-675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.I (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

[6] Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington have abolished punitive damages except where explicitly authorized by statute. *See Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917); *Boott Mills v. Boston & M.R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E. 2d 265 (1943); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); *Maki v. Aluminum Building Products*, 73 Wash. 2d 23, 436 P.2d 186 (1968).

Alabama)[7] now legislatively mandate that punitive damages may be awarded only where it is proved by at least "clear and convincing" evidence that the defendant engaged in the requisite conduct, and three other states have adopted this burden of proof as a matter of common law.[8]

Nine states have enacted legislation capping punitive awards.[9] Several states have enacted statutory provisions that: (1) specify standards guiding the determination or review of a punitive damage award;[10] (2) require or

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[7] *See* Ala. Code § 6-11-20; Alaska Code § 09.17.020; Cal. Code § 3294; Georgia Code § 51-12.5.1(b); Ind. Code § 34-4-34-2; Iowa Code § 668A.1(1)(a); Kansas Code § 60-3701(c); Kentucky Code § 411.184(2); Minnesota Code § 549.20 Subdivision 1; Montana Code § 27-1-221(5); Nevada Code § 42.005(1); North Dakota Code § 32-03.2-11; Ohio Code § 2315.21(c)(3); Oregon Code § 41.315; South Carolina Code § 15-33-135; South Dakota Code § 21-1-4.1; Utah Code 78-18-1(1).

[8] *See Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (*en banc*); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980).

[9] *See* Ala. Code § 6-11-21; Colo. Code § 13-21-103(1)(a); Fla. Code § 768.73(1)(a); Georgia Code § 51-12.5.1(g); Kansas Code § 60-3701(e); Nevada Code § 42.005.1; Oklahoma Code Title 23, § 9; Texas Code § 41.001; Virginia Code § 8.01-38.1. In addition, the Connecticut Supreme Court, in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 222 A.2d 220 (1966), held that an award of punitive damages is limited to plaintiff's litigation expenses less taxable costs.

[10] *See* Fla. Code §§ 768.73, 768.74; Kansas Code § 60-3701; Kentucky Code § 411.186; Minn. Code § 549.20 Subdivision 2; Mont. Code § 27-1-221; N.J. Code § 2A:58C-5; Oregon Code § 30.925.

permit bifurcation of punitive damages trials;[11] (3) limit the admissibility of evidence of defendant's wealth;[12] and (4) require court approval prior to the inclusion of a claim for punitive damages in a complaint.[13]

The abundance of legislative measures since 1986 demonstrates the wide variety of possible approaches to guiding jury discretion in awarding punitive damages. Because the states are addressing exactly the issues identified in *Lavoie, Bankers Life* and *Browning-Ferris,* review by this Court is unnecessary and inappropriate.

Review at this point would constitute an inappropriate intervention into a well-functioning state judicial and legislative effort to keep abreast of evolving concepts of fairness and the dictates of the United States Constitution. In *Bankers Life & Casualty Co. v. Crenshaw,* this Court expressed a clear preference for state common law and legislative solutions rather than a constitutional ruling federalizing the law of punitive damages, which are an important and longstanding part of state tort law.[14]

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[11] *See, e.g.,* Georgia Code § 51-12.5.1(d)(2).

[12] *See, e.g.,* Colorado Code § 13-21-102(6).

[13] *See, e.g.,* Idaho Code § 6-1604(2).

[14] The *Crenshaw* Court observed:

> "Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate resolutions: the . . . State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that the . . . state courts may choose to resolve the issue by relying on the state

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Alabama has adopted far-reaching common law and legislative solutions. These reforms should be given time to be tested so that Alabama and other states can assess their efficacy and determine whether other changes might be needed.

This Court has repeatedly followed that course in declining to grant certiorari to review due process challenges to common law systems for determining punitive damages, where subsequent legislative reform had substantially altered the governing standards and procedures. *E.g., Clardy v. Sanders*, 551 So.2d 1057 (Ala.), *cert. denied*, 110 S.Ct. 376 (Nov. 6, 1989); *Combined Ins. Co. v. Ainsworth*, 763 P.2d 673 (Nev.), *cert. denied*, 110 S.Ct. 376 (Nov. 6, 1989).[15]

Exercise of the Court's jurisdiction in this case would "short-circuit", *Banker's Life*, 108 S.Ct. at 1651, the reform efforts of state legislatures, which represent the collective judgment of constituents and which are particularly able, based on intimate knowledge of local conditions, to experiment with varying approaches to punitive damages that balance competing social and policy interests. For

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constitution or on some other adequate and independent nonfederal ground. . . . "

486 U.S. at 80 (footnote omitted).

[15] Indeed, the Alabama procedures in effect when this case was tried were the State's initial judicial response to this Court's discussion of Alabama's prior common law rules governing punitive damages. *See Aetna Ins. Co. v. Lavoie*, 475 U.S. 813, 828-829 (1986).

this additional reason, the Court should deny General American's petition.

V. THE LEGAL STANDARDS GOVERNING THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DO NOT PRESENT ANY OF THE POTENTIAL CONSTITUTIONAL INFIRMITIES IDENTIFIED BY MEMBERS OF THIS COURT.

Plenary review of this case would be unwarranted even if the factual record and legal context presented no serious obstacles to review. This case does not raise the sole due process issue identified by this Court as worthy of consideration: whether punitive damages may constitutionally be imposed by juries "given unbridled discretion," *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part), without statutory or common law standards constraining punitive awards. *See id.* at 2923 (Brennan, J., concurring). *See also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Under Alabama common law, the jurors in this case were not "left largely to themselves" in deciding whether to award punitive damages. To the contrary, the jury's discretion was substantially confined and was subjected to searching *de novo* scrutiny both in a post-verdict evidentiary hearing in the trial court and on appeal.

In 1986, in reviewing the decision of the Alabama Supreme Court, this Court expressed some concern about the "lack of sufficient standards governing punitive damages awards." *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 828 (1986). Immediately thereafter, the Alabama courts and

legislature began fashioning significant procedural and substantive safeguards to ensure that judges and juries receive clear substantive guidance as to when punitive damages are appropriate, and to limit substantially the overall availability of punitive damages. As a result of these efforts, there can be no plausible claim that punitive damages awards in Alabama are the product of standardless and unreviewable jury discretion.

Alabama uses a bifurcated system for deciding whether punitive damages are appropriate. The jury primarily considers the "gravity of the wrong" in an effort to determine what amount is necessary to punish and deter the wrongdoers. *See Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). To minimize the risk of bias and prejudice, Alabama strictly forbids the introduction of any evidence in the presence of the jury about the financial circumstances of either the plaintiff or the defendant. *See Southern Life & Health Ins. Co. v. Whitman*, 358 So.2d 1025 (Ala. 1978).

Alabama provides another, perhaps unique, procedural safeguard. In *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378-1379 (Ala. 1986), and *Green Oil v. Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989), the Alabama Supreme Court required trial courts to hold a post-verdict *evidentiary* hearing in every case in which a jury awards punitive damages. Seven factors must be considered in deciding whether a punitive damages award is appropriate:

> "[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct as well as the

harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

"[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.

"[4] The financial position of the defendant would be relevant.

"[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So.2d at 223-224 (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)). The considerations set forth in *Hornsby* governed the Alabama Supreme Court's decision in this case. App. A, 22a-23a.

If a defendant believes a jury's award of punitive damages is excessive, the defendant may present evidence at such a hearing to show the jury's verdict is unreasonable, disproportionate, or economically destructive. *Industrial Chemical and Fiberglass Corp., v. Chandler,* 547 So.2d 812 (Ala. 1989); *Hornsby,* 539 So.2d at 224. In order to obtain a meaningful review of the jury's punitive damages award, it is the defendant's responsibility to come forward with evidence that the jury's award has a greater impact upon the defendant than was warranted by the defendant's misconduct. *McDowell v. Key,* 557 So.2d 1243, 1249 (Ala. 1990).

After this hearing, the trial judge is required to make written findings stating reasons for accepting or modifying the jury verdict. The trial court's evaluation of these factors is subject to *de novo* review on appeal. *Central Alabama Electric Coop. v. Tapley,* 546 So.2d 371 (Ala. 1989). Appellate courts are free to assess independently the factual basis for the amount of the award and can "order a new trial due to the excessiveness of the verdict" or "order a new trial unless the plaintiff accepts a remittitur." *Id.* at 377. The appellate court also "mak[es] a comparative analysis with other awards allowed in similar cases." *Aetna Life Ins. Co. v. Lavoie,* 505 So.2d 1050, 1053 (Ala. 1987).

Alabama has thus identified specific factors that bear on the appropriateness of punitive damages awards. Alabama gives a defendant the right to demonstrate that the amount of punitive damages awarded by the jury punishes it more severely than warranted by the defendant's

misconduct and financial condition. These comprehensive trial and appellate procedures ensure that the amount of punitive damages fits the offense.

Alabama's procedures were scrupulously followed in the present case. Upon petitioner's motion for new trial and remittitur, the trial court carefully reviewed the evidence and the jury's verdict pursuant to the common law procedures set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). App. C, 31a-33a. At this point, petitioner was free, indeed obligated, under Alabama law to offer evidence that the jury's verdict would punish the defendant more severely than was warranted by its misconduct. *McDowell v. Key, supra*, 557 So.2d at 1249. However, petitioner offered no evidence whatsoever as to the financial or other impact the jury's award would or could have on petitioner.

Nevertheless, following a hearing on petitioner's motion for new trial and remittitur, the trial court independently determined, based upon its review of the evidence offered at trial, that the jury's award of $2.5 million was "too much for the conduct of which the defendants were guilty". App. C, 32a. The trial court also compared the jury's verdict with other awards in similar cases. App. A, 23a. Based on these findings, the trial court conditioned the denial of petitioner's motion for new trial upon Simmons' acceptance of a remittitur of more than 75% of the jury's verdict.

Following the trial court's review of the punitive damages award, the Supreme Court of Alabama conducted a *de novo* review of the jury's verdict and the trial court's ruling and compared the award with awards in

similar cases. After comparing the remitted award with awards in similar cases, and considering the gravity of the wrong, the Alabama Supreme Court affirmed the trial court's remittitur. All seven justices sitting on the case agreed that the amount of punitive damages, as remitted, was not excessive or disproportionate to the wrong committed by defendants.

This case illustrates that jury awards of punitive damages are indeed subjected to very real and substantial checks for excessiveness under Alabama law. Although the trial court did not employ any mathematical formula in deciding how much to remit the jury's verdict, the court did compare the jury's award with other awards in similar cases. Seven justices of the Alabama Supreme Court concurred in the trial court's assessment.

The mere absence of a legislatively prescribed range for punitive awards in no sense renders this common law regime so arbitrary or fundamentally unfair as to violate due process guarantees. As this Court has consistently recognized, state legislatures generally are "free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases. . . . " *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). Even in capital cases, this court has recognized that juries must be able to consider an encompassing range of factors in making "the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quotation omitted).

Petitioner has been afforded all the essentials of due process. The trial court's reduction of punitive damages

to less than 25% of the jury's verdict is telling of the substantial protections afforded defendants in Alabama against arbitrary or excessive jury verdicts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 90-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

v.

BRAD L. SIMMONS,
Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent contends that Questions 1 and 3 of the petition, which challenge under the Due Process Clause the standardless discretion of juries to impose punitive damages in unlimited amounts and the lack of procedural safeguards for imposing such punishment, are not sufficiently substantial or important to warrant review by this Court. Respondent also challenges the adequacy of General American's presentation to the Alabama courts of Question 2—whether the imposition of liability for punitive damages in this case based upon a theory of *respondeat superior* violated the Due Process Clause. General American will address each of these arguments in turn.

1. Questions 1 and 3 of the Petition are Substantial and Worthy of this Court's Plenary Consideration.

Questions 1 and 3 of the petition are presently before the Court in another Alabama case, *Pacific Mutual Life Insurance Co.* v. *Haslip*, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990) (to be argued Oct. 3, 1990), which the court below viewed as dispositive of General American's federal constitutional challenges to the $600,000 punitive damage award in this case. Respondent repeats essentially verbatim many of the same arguments that were advanced by the respondent in *Pacific Mutual* in opposition to that petition.[1] But the grant of certiorari

[1] *Compare* Opp., at 13-26 *with* Respondent's Br. in Opp. *in Pacific Mutual*, at 11-21. Respondent in this case adds only one new argument to those advanced in *Pacific Mutual*, contending

in *Pacific Mutual* necessarily rejected those precise arguments. It is therefore *a fortiori* that the questions presented in General American's petition are substantial and worthy of review.[2]

2. Question 2, the Due Process Challenge to the Imposition of Punitive Damages Based upon the Theory of *Respondeat Superior*, was Properly Presented to the Alabama Courts.

Respondent does not dispute the importance of Question 2, contending instead that General American did not properly preserve in the Alabama courts its argument that the vicarious imposition of liability for punitive damages in this case violates the Due Process Clause. That contention is without merit.

First, in the case at bar the Supreme Court of Alabama expressly relied upon *Pacific Mutual* to dispose of General American's federal due process chal-

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that the Court should deny the petition because "[e]very state and federal court to have considered the question has . . . ruled that the common law method for assessing punitive damages satisfied due process." Opp., at 12. But the refusal of the lower federal and state courts to apply the Due Process Clause to control unlimited and excessive punitive damage awards, notwithstanding the recent statements of this Court (and individual Justices) regarding the serious constitutional implications of such punishment, is precisely why it is finally necessary for this Court to intervene. *See* Pet. for Cert., at 9-17 *in The Ohio Casualty Ins. Co.* v. *G. Amador Corp., pet. for cert. filed*, June 19, 1990 (No. 89-1986) ($10,000,000 punitive damage award).

[2] In fact, respondent concedes that Question 1 of the petition, whether the imposition of punitive damages "without statutory or common law standards" violates the Due Process Clause, Opp., at 23, has been "identified by this Court as worthy of consideration." *Id.*

lenges, noting that it "has consistently rejected the same arguments made by the defendants and has upheld the constitutionality of punitive damages." Pet., App. A, at 20a. In *Pacific Mutual*, the court below rejected the argument that the Due Process Clause precludes the vicarious infliction of punitive damages against a principal for the unauthorized actions of a purported agent, and left no doubt that it considered the vicarious liability issue to be part and parcel of a broader due process challenge to the standardless imposition of punitive damages.[3] Although General American filed its briefs in the court below prior to the issuance of the opinion in *Pacific Mutual*, it would have been a manifestly futile exercise for General American to have articulated a specific due process challenge to the *respondeat superior* theory of liability in that court separate from its more generalized due process attack on the punitive damage award.

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[3] After rejecting Pacific Mutual's Excessive Fines Clause challenge to punitive damages based upon this Court's decision in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), the court below disposed of Pacific Mutual's due process challenges by simply stating that "in a series of recent cases, this Court has rejected the remaining constitutional arguments submitted by Pacific Mutual." 553 So. 2d, at 543, *citing Industrial Chemical & Fiberglass Corp.* v. *Chandler*, 547 So. 2d 812 (Ala. 1988); *United American Ins. Co.* v. *Brumley*, 542 So. 2d 1231 (Ala. 1989); *HealthAmerica* v. *Menton*, 551 So. 2d 235 (Ala. 1989), *cert. denied*, 110 S. Ct. 1166 (1990); *Olympia Spa* v. *Johnson*, 547 So. 2d 80 (Ala. 1989). That "series of recent cases," which the court below also cited in this case, involved "fundamental fairness" challenges under the Due Process Clause to the standardless discretion of juries to impose punitive damages in unlimited and excessive amounts, *see, e.g.*, *Industrial Chemical*, 547 So. 2d, at 837, not specific challenges to the theory of *respondeat superior*.

Second, the *ad hoc* and subjective nature of Alabama's *respondeat superior* doctrine (*see* Pet., at 8-12) only serves to aggravate and compound the capriciousness and unpredictability that are the hallmarks of that State's punitive damage regime.[4] At every stage of the proceedings below, General American challenged under the Due Process Clause the vague and elastic "standards" upon which Alabama juries are permitted to impose liability for punitive damages and the resulting arbitrariness of that system. *See* Pet., at 4-6. Question 2 of the petition may well be more specific, but it is certainly "within the clear intendement" of General American's broader Due Process Clause challenge to the standardless Alabama punitive damage system and therefore within this Court's jurisdiction. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *see, e.g.*, *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982); *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Braniff Airways, Inc.* v. *Nebraska State*

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[4] Contrary to respondent's assertion (Opp., at 1-2), the Supreme Court of Alabama did not affirm General American's vicarious liability for punitive damages based upon a finding that the insurance agent from whom respondent's wife attempted to purchase a policy actually was an "employee" of General American rather than an independent agent as specified in the contract between the agent and General American. The court below simply found that because General American "had authority to hire and fire its agents, to determine the methods by which they were trained, to issue its company training manuals, and to pay its agents their commissions," vicarious punishment was appropriate under "the facts of [this] case," Pet., App. A, at 9a-10a, even though General American concededly had not authorized, approved, or ratified the allegedly fraudulent conduct of the agent in this case.

Board of Equalization and Assessment, 347 U.S. 590, 598-99 (1954).

Finally, although framed as a separate question in the petition, General American's *respondeat superior* argument is, at most, "only an enlargement," *Dewey* v. *Des Moines*, 173 U.S. 193, 197 (1899), of its argument in the courts below that the trial court and jury in this case had "no defined standard by which to assess punitive damages" (Pet., App. E, at 40a), thus producing an "arbitrary imposition" of punitive damages against General American in violation of due process. *Id.*, at 45a. This Court has long recognized that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey*, 173 U.S., at 197-98; *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although the precise issue was not raised in the courts below, the issue could be considered in this Court because it involved the same "constitutional premise raised below" and the "method of analysis [was] readily available to the state court"); *see also Pruneyard Shopping Center*, 447 U.S., at 85-86 n.9; *Illinois* v. *Gates*, 462 U.S. 213, 248 & n.2 (1983) (White, J., concurring in the judgment) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of . . . a federal claim be raised and decided below."). Thus, General American's failure in the court below to articulate in any specific formulation its constitutional objections to the vicarious nature of the punishment should not preclude it from doing so in this Court.

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No. 90-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

v.

BRAD L. SIMMONS,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner General American Life Insurance Company ("General American") submits this supplemental brief pursuant to Rule 15.7 of the Rules of this Court to address the Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Mar. 4, 1991). In *Pacific Mutual*, the Court held that the Due Process Clause of the Fourteenth Amendment may render a punitive damage award "constitutionally unacceptable," slip op., at 15, identified certain relevant criteria for determining whether a punitive damage award "cross[es] the line into the area of constitutional impropriety," *id.*, at 20, and scrutinized a punitive damage award to decide whether it comported with due process. Question 1 of this petition squarely raises these issues, and application of the criteria relied upon by the Court in *Pacific Mutual* demonstrates that the $600,000 punitive damage award imposed against General American in this case is a constitutionally excessive and fundamentally unfair punishment that violates the Due Process Clause.

The Supreme Court of Alabama did not analyze the punitive damage award in this case under the Due Process Clause. Instead, it flatly rejected petitioner's arguments that the federal constitution constrains the award of punitive damages, relying upon its previous decisions in which it "rejected the same arguments . . . and . . . upheld the constitutionality of punitive damages." Pet., App. A, 20a. It also concluded that Alabama's post-verdict procedures for reviewing punitive damage awards, as set forth in *Hammond* v.

City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989), wholly insulate punitive damage awards produced by the Alabama system from constitutional attack. Pet., App. A, 20a.

That position—that punitive damages are *per se* constitutional—was, of course, rejected by this Court in *Pacific Mutual*. "It would be . . . inappropriate to say that . . . [the] imposition [of punitive damages] is never unconstitutional." Slip op., at 14-15. Indeed, even though "Pacific Mutual had the benefit of the full panoply of Alabama's procedural protections," *id.*, at 19, this Court gave independent and "careful consideration" (*id.*, at 20) to the question whether the award in that case was so grossly disproportionate to the severity of the offense and the amount of compensatory damages that it violated the Due Process Clause.

General American is entitled to have the punitive damage award imposed against it subjected to the same kind of "careful" federal constitutional analysis under the standards articulated by this Court in *Pacific Mutual*. Although the award in *Pacific Mutual* was only "4 times the amount of the compensatory damages," and "200 times the out-of-pocket expenses of respondent," slip op., at 20, the Court concluded that the punishment in that case was "close to the line . . . of constitutional impropriety . . . ." *Id.* In this case, the punitive damage award is *59* times the amount of respondent's actual injury under the most

generous reading of the record below[1] and respondent sustained not a single penny of out-of-pocket losses.[2]

Moreover, a punitive "verdict returned by a biased or prejudiced jury no doubt violates due process," *Pacific Mutual*, slip op., at 3 (Kennedy, J., concurring in the judgment); *see also Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989) (assuming that a punitive verdict may not be upheld under the Due Process Clause if "it was the product of bias or passion"), and the "extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case." *Pacific Mutual*, slip op., at 3 (Kennedy, J., concurring in the judgment). But the court below did not even address General American's federal due process argument that bias and prejudice infected the jury's deliberations and "that [a] new trial is required," Pet., App. D, 36a-37a, despite the fact that the jury returned a $2,500,000 verdict to punish conduct that inflicted no more than $10,000 in actual injury,[3] and even though

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[1] The jury's general verdict did not differentiate between compensatory and punitive damages. Petitioner has assumed in this Court and in the court below that the entire $600,000 judgment was punitive, and respondent concedes that the compensatory portion of the judgment was, at most, $10,000. Opp., at 4. *See also* Pet., App. A, 25a (Houston, J., concurring) ("the trial court instructed the jury that $10,000 was the total amount of compensatory damages that [respondent] could recover. There was no objection to this.").

[2] Prior to filing this action, respondent received a complete refund, with interest, of his tendered insurance premiums. *See* R. 285, 296.

[3] *See supra* note 1. The jury's $2,500,000 verdict vastly exceeded the punitive damage award in *Washington National In-*

three jurors had concealed during *voir dire* their previous personal involvment in litigation against insurance and financial service companies similar to General American. *See* Pet., App. A, 17a-19a.[4]

The result is a fundamentally unfair punishment that, even after the trial court's remittitur, is "grossly out of proportion to the severity of the offense," *Pacific Mutual*, slip op., at 18-19, and therefore "cross[es] the line . . . of constitutional impropriety." *Id.*, at 20a. Accordingly, the petition should be granted and the case either set for plenary consideration or vacated and remanded to the Supreme Court of Alabama for reconsideration in light of *Pacific Mutual*.

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surance Co. v. *Strickland*, 491 So. 2d 872 (Ala. 1985), a case which was, as Justice Houston observed in his concurring opinion below, "substantially similar" to this case and involved "the same conduct, within a five-year period," and "the same jury instruction." Pet., App. A, 25a (Houston, J., concurring). There is simply no rational explanation for such radically differing punishments. *See id.* ("Were Washington National and its special agent . . . not punished enough? Or was General American and it special agent . . . punished too much? Take the even, or take the odd."); *see also Pacific Mutual*, slip op., at 9 (O'Connor, J., dissenting) (discussing "vastly disparate results" of *Washington National* and this case).

[4] Actual bias in the Alabama civil justice system has, in the past, led this Court to set aside a punitive damage judgment imposed against an insurance company. *See Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986). However, the trial court "immediately rejected bias" as an explanation for the massive award (Pet., App. C, 32a) without developing any "testimony on which to base [its] ruling that there was no probable prejudice . . . ." Pet., App. A, at 27a (Steagall, J., dissenting in part). The Supreme Court of Alabama held, as a matter of state law, that the trial court "did not abuse its discretion" when it refused to grant a new trial on grounds of bias or prejudice. Pet., App. A, at 19a.

Respectfully submitted,

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